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AN ESSAY

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ON THE

PRINCIPLES

OF

CIRCUMSTANTIAL EVIDENCE,

Illustrated by Numerous Cases.

BY

WILLIAM WILLS, ESQ.

Nulla denique est causa, in qua id, quod in judicium venit, ex reorum personis, non generum ipsorum universa disputatione quæratur.—*Cic. de Oratore.*

FROM THE THIRD LONDON EDITION.

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PREFACE

TO THE FIRST EDITION.

THE most important doctrines of Circumstantial Evidence have been so ably treated in the learned works of Mr. Bentham and Mr. Starkie, that an apology may be thought necessary for this publication. It will however be perceived, that the design of the following Essay is different in some important particulars from that of either of the above-mentioned authors; and that an attempt has been made to illustrate the subject by the application of many instructive cases, some of which have been compiled from original documents, and others from publications not easily accessible.

It has not always been practicable to support the statement of cases by reference to books of recognised authority, or of an equal degree of credit; but discrimination has uniformly been exercised in the adoption of such statements; and they have generally been verified by comparison with contemporaneous and independent accounts. A like discretion has been used in the rejection of some generally received cases of circumstantial evidence, the authenticity of which does not appear to be sufficiently established.

It is to be regretted that, with the exception of the State Trials, there is no authoritative collection of English cases of controverted fact, for which nevertheless there are extant abundant materials. Isolated and anomalous as such cases may appear to be, they, like every other part of the great system of jurisprudence, are reducible to consistent and immutable principles of reason and natural justice. There has existed hitherto little inducement to any such compilation, since, (however pertinent and instructive such cases might be,) by an unreasonable rule of legal procedure they were shut out from practical application. It is probable that, as the consequence

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of recent legislative changes, cases of circumstantial evidence will hereafter be treated with an amplitude of argument and illustration, both as to fact and principle, which will give them an increased value, and offer inducements to the satisfactory record of such cases for the purposes both of practical use and liberal curiosity.

In the course of my experience and reading, my attention has frequently been drawn to the leading principles of circumstantial evidence. The matter which presented itself upon this favorite subject of study, and the thoughts which it suggested, it was my practice to preserve ; and thus, without any view to publication, materials gradually and insensibly accumulated, which at length I have endeavoured to methodize and arrange in the present volume. Notwithstanding the originality of some of those materials, and the novelty of their arrangement and combination, it is probable that few of the generalizations and reflections advanced in this Essay can be considered as strictly original. The labor of composing these pages has nevertheless been an agreeable and useful employment, in the brief intervals of leisure from other pursuits ; and though I am not insensible to their deficiences, I am not without the hope that they may be in some degree serviceable to others. At any rate this essay will be considerately received by those who rightly estimate the importance of the subject, and the difficulties of such an attempt.

W. W.

Edgbaston, near Birmingham,
February, 1838.

PREFACE

TO THE THIRD EDITION.

THE favourable reception which this Essay has met with has induced me again to commit it to the press.

I have incorporated with the text of the present edition the more recent cases of circumstantial evidence, in some of which the leading doctrines applicable to that department of moral and legal science have been declared with a clearness, precision and completeness which are not to be found in connection with the earlier cases. Those parts of the Work which relate to the subject of presumptions have been considerably enlarged, and other portions of it have been wholly re-written.

I avail myself of this opportunity of recording my obligations to that profound jurist and upright magistrate, the late Chancellor Kent, to whose estimate of this Essay I have been indebted for its re-publication in the United States of America.

Nor can I quit my subject without expressing my admiration of the simplicity and harmony of our English system and rules of evidence, and of their incomparable superiority to those of all other nations which have adopted or modified the doctrines and practice of the Civil Law, so unworthy of the general excellence of that imperishable monument of human wisdom; a superiority for which we are mainly indebted to the uncompromising resistance made by our forefathers to every attempt to substitute the intangible subtleties and impracticable formulæ of the Roman jurisprudence for the plain and intelligible principles of our own Common Law.

W. W.

Egbaston, February 1850.

TABLE OF CONTENTS.

[The figures refer to the original pages, indented in the margin.]

CHAPTER I.

EVIDENCE IN GENERAL.

Page

Sect. 1.—Nature of Evidence 1
2.—Various kinds of Evidence 2
3.—Nature of the Assurance produced by different kinds of Evidence 4

CHAPTER II.

CIRCUMSTANTIAL EVIDENCE.

Sect. 1.—Essential Characteristics of Circumstantial Evidence 15
2.—Presumptions 17
3.—Relative value of Direct and Circumstantial Evidentiary Facts 33

CHAPTER III.

INCULPATORY MORAL INDICATIONS.

Sect. 1.—Motives 37
2.—Declarations of Intention 45
3.—Preparations for the Commission of Crime . . 46
4.—Recent Possession of the Fruits of Crime . . 47
5.—Unexplained Appearances of Suspicion, and attempts to account for them by false representations . 57
6.—Indirect Confessional Evidence 60
7.—The Suppression, Destruction, Fabrication and Simulation of Evidence 72
8.—Statutory Presumptions 84

CHAPTER IV.

EXTRINSIC AND MECHANICAL INCULPATORY INDICATIONS.

Sect. 1.—Identification of Person 90

Page
Sect. 2.—Identification of Articles of Property . . . 104
3.—Proof of Hand-writing 108
4.—Verification of Time and Dates 114

CHAPTER V.

EXCULPATORY PRESUMPTIONS AND CIRCUMSTANTIAL EVIDENCE 120

CHAPTER VI.

RULES OF INDUCTION APPLICABLE TO CIRCUMSTANTIAL EVIDENCE 135

CHAPTER VII.

PROOF OF THE CORPUS DELICTI.

Sect. 1.—General Doctrine as to the Proof of the Corpus Delicti. 156
2.—Proof of the Corpus Delicti by Circumstantial Evidence 158
3.—Application of the doctrine to cases of Homicide . 162
4.—Application of the general principle to proof of the Corpus Delicti in cases of poisoning . . . 178
5.—Application of the general principle to the proof of the Corpus Delicti in cases of Infanticide . . 203

CHAPTER VIII.

FORCE AND EFFECT OF CIRCUMSTANTIAL EVIDENCE.

Sect. 1.—General grounds of the Force of Circumstantial Evidence 209
2.—Considerations which augment the Force of Circumstantial Evidence in particular cases . . . 213
3.—Cases Illustrative of the Force of Circumstantial Evidence 225
4.—Conclusion 245

TABLE

OF CASES CITED IN THIS WORK.

CIVIL CASES.

A.

Allport *v.* Meek, 109.
Armorie *v.* Delamirie, 72.
Ashford *v.* Thornton, 145.

B.

Banbury Peerage, 32.
Bromage *v.* Rice, 109.

C.

Chambers *v.* The Queen's Proctor, 224.
Clunnes *v.* Pezzy, 73.
Constable *v.* Steibel, 110.
Craig *v.* Earl of Anglesea, 73.
Crisp *v.* Walpole, 114.

D.

Doe d. Day *v.* Day, 94.
Doe d. Mudd *v.* Suckermore, 109, 110, 111.
Doe d. Perry *v.* Newton, 109.
Douglas case, 94.

E.

Eagleton *v.* Kingston, 112.

F.

Fitzwalter Peerage, 110.

G.

Goodtitle *v.* Revett, 110.
Griffith *v.* Williams, 109.
Griffits *v.* Ivery, 109, 111.
Gurney *v.* Langlands, 110.

H.

Hughes *v.* Rogers, 111.

J.

Jayne *v.* Price, 128.

L.

Lawton *v.* Sweeney, 73.

M.

Mortimer *v.* Craddock, 72.
Mossam *v.* Ivy, 115.

R.

Robson *v.* Rocke, 112, 114.
Rutledge *v.* Carruthers, 94.

S.

Smith *v.* Earl Ferrers, 118, 219.
Solita *v.* Yarrow, 109.

T.

Tracy Peerage, 73, 110.

W.

Waddington *v.* Cousins, 109.

Y.

Young *v.* Brown, 110.
Young *v.* Horner, 111.

CRIMINAL CASES.

A.

Adams, 49.
Alcorn, 180.
Alexander, 113.
Alman, 84.
Angus, 204.
Anonymous, 47, 49, 54, 67, 69, 86, 92, 96, 97, 103, 105, 110, 114, 117, 165, 172, 175.
Aram, 69.
Arden, 95.
Arundel and others, 128
Avery, 215.

B.

Ball, 44.
Banks, 88.
Barnard, 130.
Bate, 96, 203.
Beards, 101.
Belany, 175.
Bell, 43.
Bingham, 125.
Blandy, 28, 43, 157.
Boorns, the two, 63, 163.
Booth, 172.
Bowditch, 218.
Bowman, 52.
Brain, 204.
Brennan, 133.
Brindley, 100.
Brook, 93, 95.
Brown and Wood, 31, 91.
Buish, 127.
Burdett, 17, 47, 53, 145, 146, 156, 158.
Burdock, 54, 76, 165, 197.
Byrne, 94.

C.

Carrol, 43.
Carsewell, 112.
Carter, 107.
Castaing, 180.
Cator, 110.
Clewes, 65, 149, 165.
Clinch and Mackler, 91.
Cockin, 48.
Cole, 131.
Coleman, 68, 71, 82, 91.
Collier, 128.
Connor, 220.
Cook, 77, 165.
Corder, 170.
Cornwallis, Lord, 157.
Courtnage and Mossingham, 130.
Courvoisier, 53, 241.
Crossley, 157.
Crutchley, 201.
Cruttenden, 49.
Cuthell, 84.

D.

Davidson, 205.
Davison, 131.
Dawtrey, 58.
De la Motte, 73, 109.
Despard, 147.
Dewhirst, 49.
Diggles, 53.
Donellan, 28, 73, 76, 78, 79, 187, 192.
Donnall, 71, 73, 76, 124, 187, 188.
Downie and Milne, 51.
Downing, 125, 137, 139, 158, 220.
Duffin, 43.
Du Moulin, 130.
Dunnet, 88.

E.

Edge, 148, 164.
Elder, 182.
Eldridge, 61.
Ellis, 55.
Enoch, 204.

F.

Farrington, 42.
Faulkner, 161.
Felton, 62.
Fenning, 127.
Ferguson, 203.
Fisher, 61.
Fitter, 79, 129.

Fraser, 133.
Freeman, 130, 175.
Frost, 147.
Fuller, 46, 53.

G.

Gardelle, 76.
Gill, 55, 165.
Good, 77, 165.
Graham, 76, 189.
Green and others, 71, 163.
Greenacre, 78, 171, 220.
Greenwood, 92.
Grounall, 205.

H.

Haggerty and others, 69.
Haigh, 175.
Haines, 93.
Harvey, 42.
Hawkins, 114, 125.
Hayes and others, 165.
Heath and Crowder, 97.
Heaton, 104.
Hewlett, 49.
Higgins, 66, 183.
Hindmarsh, 164.
Hinley, 50.
Hobson, 157.
Hodges, 33, 95, 151.
Hodgson, 44, 171.
Hopkins, 164.
Horne, 149.
Howe, *alias* Wood, 234.
Hubert, 63.
Hull, 44.
Humphreys, 115, 168.

I.

Isaacs, 58.

J.

Jeffreys and Swan, 81, 95.
Jennings, 130.
Johnson, 110, 112.
Jones, 65.
Jones and Welch, 68.

K.

Kirkwood, 44.

L.

Locker, 60, 99, 141, 220.

M.

M'Dougal, 165.
M'Kechnie and Tolmie, 56, 108.
M'Kinley, 121.
Macowan, 165.
Mansfield, 50.
Manning and Wife, 201, 212, 221.
Martin, 44.
Mayene, 104, 130.
Mellor, 147.
Melville, Viscount, 72.
Miles, 163.
Millward, 44.
Mountford, 97.

N.

Norkott, 80.

O.

Okeman, 34.
Oliver, 95.

P.

Palayo, 99.
Partridge, 49.
Patch, 30, 79, 118, 150, 230.
Perreys, the, 162.
Poulton, 204.

R.

Reeves, 204.
Richardson, 59, 103, 225.
Rickman, 53.
Riembaur, 63.
Robins, 105.
Robinson, 83, 92.
Roper, 149.
Rush, 217.

S.

Sawyer, 113.
Scofield, 127.
Sellis, 254.
Shaw, 104, 132.
Simpson, 203.
Smith, 30, 48.

Smith, Varnham and Timms, 103, 237.
Squires and Wells, 218.
Standsfield, 34.
Steptoe, 66.
Stewart, 206.
Sunderland, 44.
Swan and Jeffreys, 81, 95.

T.

Tawell, 44, 60, 154, 161, 162, 168, 180, 188, 198.
Thomas, 75.
Thornton, 60, 104, 119, 128, 133, 141, 220.
Thurtell, 164.
Tippett, 61.
Trilloe, 204.

V.

Voke, 44.

W.

Waigh, 131.
Wall, 149.
Warrickshall, 60.
Warwickshire case, 82, 163.
Watson, 147.
Webster, 106.
Wescombe, 79.
Whalley, 123.
White, 61, 107.
Whittall, 130.
Wilson, 67.
Wood, 132.
Wood, *alias* Howe, 234.
Wood and Brown, 31, 91.
Woodburne and Coke, 42.
Wright, 204.

THE PRINCIPLES

OF

CIRCUMSTANTIAL EVIDENCE.

CHAPTER I.

EVIDENCE IN GENERAL.

SECTION 1.

THE NATURE OF EVIDENCE.

It will greatly conduce to the formation of clear and correct notions on the subject of Circumstantial Evidence, to take a brief introductory view, of the nature of evidence in general, of some of its various kinds, and of the nature of the assurance which each of them is calculated to produce.

The great object of all intellectual research is the discovery of TRUTH, which may be defined to be the conformity of words, ideas, and relations with the nature and reality of events and things.

The JUDGMENT is that faculty of the mind which is principally concerned in the investigation and acquisition of truth; and its exercise is the intellectual act by which one thing is perceived and affirmed of another, or the reverse.

Every conclusion of the judgment, whatever may be its subject, is the result of EVIDENCE,—a word which (derived from words in the dead languages signifying to see, to know,) by a natural transition is applied to denote the *means* *by which any [*2] alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

The term PROOF is often confounded with that of evidence, and applied to denote the *medium* of proof, whereas in strictness it marks merely the *effect* of evidence. When the result of evidence

is undoubting assent to the certainty of the event or proposition which is the subject-matter of inquiry, such event or proposition is said to be *proved;* and, according to the nature of the evidence on which such conclusion is grounded, it is either *known* or *believed* to be true*. Our judgments then, are the consequence of proof; and proof is that quantity of appropriate evidence which produces assurance and certainty; evidence therefore differs from proof, as cause from effect.

It is unnecessary, in relation to the subject of this section, to mention the inferior degrees of assurance, which will be more appropriately noticed in another place.

SECTION 2.

THE VARIOUS KINDS OF EVIDENCE.

TRUTH is either abstract and necessary, or probable and contingent; and each of these kinds of truth is discoverable by appropriate, but necessarily different kinds of evidence. This classification, however, is not founded in any essential difference in the nature of truths themselves, and has reference merely to our imperfect capacity and ability of perceiving them; since to an Infinite Intelligence nothing which is the object of knowledge can be probable, and everything must be perceived absolutely and really as it is†.

[*3] In many instances the correspondence of our ideas with realities is perceived instantaneously, and without any *conscious intermediate process of reasoning, in which cases the judgment is said to be INTUITIVE, from a word signifying to look at; and the evidence on which it is founded is also denominated intuitive; though it would perhaps be more correct to use that word as descriptive of the nature of the mental operation, rather than of the kind of evidence on which it rests.

INTUITION is the foundation of DEMONSTRATION, which consists of a series of steps severally resolvable into some intuitive truth. Demonstration concerns only necessary and immutable truth; and its first principles are definitions, which exclude all ambiguities of language, and lead to infallibly certain conclusion.‡

* Whateley's Logic, b. iv. ch. iii. s. 1.

† Butler's Analogy, Introduction.

‡ Stewart's Elements of the Philosophy of the Human Mind, vol. ii. ch. ii. s. 3

But wide as is the range of the human intellect, the subjects which admit of the certainty of intuition and demonstration are comparatively few. Innumerable truths, the knowledge of which is indispensable to happiness, if not to existence, depend upon evidence of a totally different kind, and admit of no other guide than our own consciousness or the testimony of our fellow-men. The subjects of evidence of these latter kinds are questions of facts or of actual existence, which, as they are not of a necessary nature, may or may not have existed, without involving any contradiction, and as to which our reasonings and deductions may be erroneous. Such evidence is called MORAL EVIDENCE; probably because its principal application is to subjects directly or remotely connected with moral conduct and relations.*

Of the various kinds of moral evidence, that of TESTIMONY is the most comprehensive and important in its relation to human concerns; so extensive is its application, *that to [*4] enter on the subject of testimony at large, would be to treat of the conduct of the understanding in relation to the greater portion of human affairs. The design of this essay is limited to the consideration of some of the principal rules and doctrines peculiar to circumstantial evidence as applicable to criminal jurisprudence, —one of the leading heads under which philosophical and juridical writers consider the subject of testimonial evidence. Nor is it proposed to treat, except cursorily and incidentally, of *documentary* circumstantial evidence; a subject which, however interesting in itself, is applicable principally to discussions upon the genuineness of historical and other writings; and such cases of this description as occasionally happen in the concerns of common life, are referable to general principles, which equally apply to circumstantial evidence of every kind.

Considering how many of our most momentous determinations are grounded upon circumstantial evidence, and how important it is, that they should be correctly formed, the subject is one of deep interest, and moment. It would be most erroneous to conclude that, because it is illustrated principally by forensic occurrences, it especially concerns the business or the members of a particular profession. Such *events* are amongst the most interesting occurrences of social life; the *subject* relates to an intellectual process, called into exercise in almost every branch of human speculation and research.

* Gambier's Introduction to the Study of Moral Evidence, p. 1. (ed. 3.) Crombie's Natural Theology, vol. i. pp. 448, 354.

SECTION 3.

NATURE OF THE ASSURANCE PRODUCED BY DIFFERENT KINDS OF EVIDENCE.

In investigations of every kind it is essential that a correct estimate be made, of the kind and degree of assurance of which the subject admits.

[*5] *Since the evidence of DEMONSTRATION relates to necessary truths, (as to which the supposition of the contrary involves not merely what is not and cannot be true, but what is also absurd,) and since MORAL EVIDENCE is the basis of contingent or probable truth merely, it follows that the convictions which these various kinds of evidence are calculated to produce must be of very different natures. In the former case ABSOLUTE CERTITUDE is the result; to which MORAL CERTAINTY, the highest degree of assurance of which truths of the latter class admit, is necessarily inferior.

Unlike the assent, which is the inevitable result of mathematical reasoning, BELIEF in the truth of events may be of various degrees, from moral certainty, the highest, to that of mere probability, the lowest; between which extremes there are innumerable degrees and shades of conviction, which the latency of mental operations and the unavoidable imperfections of language render it impossible to define or express. In subjects of moral science, the want of appropriate words, and the occasional application of the same word to denote different things, have given occasion to much obscurity and confusion both of idea and expression; of which a remarkable exemplification is presented in the words probability and certainty.

The general meaning of the word PROBABILITY is likeness or similarity to some other truth, event, or thing*. Sometimes the word probability is used to express the preponderance of the evidence or arguments, in favour of the existence of a particular event or proposition, or adverse to it; and sometimes as assertive of the abstract and intrinsic credibility of a fact or event.

[*6] In its former sense the probability is applied as *well to certain mathematical subjects, as to questions dependent upon moral evidence, and it expresses the ratio of the favourable cases to all the possible cases by which an event may happen or fail; and it is represented by a fraction, the numerator of

* Butler's Analogy, Introduction. Locke's Essay concerning Human Understanding, b. iv. ch. xv. Cic. De inventione, c. 47.

which is the sum of the favcurable cases, and the denominator the whole number of possible cases, certainty being represented by unity. If the number of chances for the happening of the event be =0, and the event be consequently impossible, the expression for that chance will be =0; and so, if the number of chances of the failure of the event be =0, and the event be therefore certain, the expression for the chance of failure, will also be =0. If $m+n$ be the whole number of cases, m the favourable and n the unfavourable ones, the probability of the event is $m : m+n$. It follows, that if there be an equality of chances for the happening or the failing of an event, the fraction expressive of the probability is $=\frac{1}{2}$, the mean between certainty and impossibility*; and probability therefore includes the whole range between those extremes.

The terms CERTAINTY and PROBABILITY are however essentially different in meaning as applied to moral evidence, from what they import in a mathematical sense; inasmuch as the elements of moral probability, notwithstanding the ingenious arguments which have been urged to the contrary, appear to be incapable of numerical expression, and because it is not possible to assign all the chances for or against the occurrence of any particular event.

The expression MORAL PROBABILITY, though liable to objection on account of its deficiency in precision, is for want of one more definite and appropriate, of frequent and necessary use; nor will its application lead to mistake, if it be remembered, that it expresses only the preponderance *of probability, resulting [*7] from the comparison and estimate of *moral* evidence, and that if it were capable of being expressed with exactness, it would lose its essential characteristic and possess the certainty of demonstration.

The preceding strictures equally apply to the expression MORAL CERTAINTY, which must be understood, not as importing deficiency in the proof, but only as descriptive of the kind of certainty which is attainable by means of moral evidence; and it is that degree of assurance which induces a man of sound mind to act without doubt upon the conclusions to which it leads.†

It has been justly and powerfully remarked by a noble and learned writer, that "the degree of excellence and of strength to which testimony may rise seems almost indefinite. There is hardly any

* Kirwan's Logic, part iii. ch. vii. s. 1.

† Stewart's Elements, vol. ii. ch ii. s. 4. Encyclopædia Brit., art. METAPHYSICS, part i.

cogency which it is not capable by possible supposition of attaining. The endless multiplication of witnesses—the unbounded variety of their habits of thinking, their prejudices, their interests—afford the means of conceiving the force of their testimony augmented *ad infinitum*, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us.*" But if evidence leave reasonable ground for doubt, the conclusion cannot be morally certain, however great may be the preponderance of probability in its favour.

Some mathematical writers have propounded numerical fractions for expressing moral certainty; which, as might have been expected, have been of very different values. But the nature of the subject precludes the possibility of reducing to the form of arithmetical notation the subtle, shifting, and evanescent elements of moral assurance, or of bringing to quantitative comparison, things so inherently different as certainty and probability.

[*8] *Other writers have given, in a more general manner, mathematical form to moral reasonings and judgments; but it is questionable if they have produced any useful result, however they may have shown the ingenuity of their authors.† Though it be true that some very important deductions from the doctrine of chances, are applicable to events dependent upon the duration of human life, such as the expectation and the decrement of life, the law of mortality, the value of annuities and other contingencies, and also to reasoning in the abstract upon particular cases of testimonial evidence,‡ yet it is obvious, that all such conclusions depend upon circumstances, which, notwithstanding that to the superficial and unreflecting observer they appear casual, uncertain, and irreducible to principle, unlike moral facts and reasonings in general are really based upon and deducible from numerical elements.§

A learned writer, whose opinions, in despite of his numerous eccentricities of matter and of style, have exercised great influence in awakening the spirit of judicial reformation, and are destined to exercise still more auspicious influences, asks,‖ "Does justice require less precision than chemistry?" The truth is, that the precision attainable in the one case is of a nature of which the other

* Lord Brougham's Discourse on Natural Theology, p. 251.

† See Kirwan's Logic, part iii. ch. vii. s. 21. Whately's Logic, b. iv. ch. ii. s. 1.

‡ Whately's Logic, b. iv. ch. ii. s. 1. § Lubbock on Probability.

‖ Bentham's Traité des Preuves Judiciaires, b. i. ch. xvii. Mackintosh's Discourse on the Progress of Ethical Philosophy, p. 290.

does not admit. It would be absurd to require the proof of an historic event, by the same kind of evidence and reasoning as that which establishes the equality of triangles upon equal bases and between the same parallels, or that the *latus rectum* in an ellipse is a third proportional to the major and minor axes.

This conscript father of legal reforms* has himself sup- [*9]
*plied a memorable illustration of the futility of his own inquiry. He has proposed a scale for measuring the degrees of belief, with a positive and a negative side, each divided into ten degrees, respectively affirming and denying the same fact, zero denoting the absence of belief; and the witness is to be asked what degree expresses his belief most correctly. With his characteristic ardour, the venerable author gravely argues that this instrument could be employed without confusion, difficulty, or inconvenience.† But MAN must become wiser and better before the mass of his species can be entrusted with the use of such a moral guage, from which the unassuming and the wise would shrink, while it would be eagerly grasped by the conceited, the interested, and the bold.

But, though a process strictly mathematical cannot be applied to estimate the effect of moral evidence, a proceeding somewhat analogous is observed in the examination of a group of facts adduced as grounds for inferring the existence of some other fact. Although an *exact* value cannot be assigned to the testimonial evidence for or against a matter of disputed fact, the separate testimony of each of the witnesses has nevertheless a determinate *relative* value, depending upon considerations which it would be foreign to the present subject to enumerate. On one side of the equation are mentally collected all the facts and circumstances which have an affirmative value; and on the other, all those which lead to an opposite inference, or tend to diminish the weight, or to show the non-relevancy, of all of the circumstances which have been put into the opposite scale. The value of each separate portion of the evidence is separately estimated, and, as in algebraic addition, the opposite quantities, positive and negative, are united, and the *balance* of probabilities is what remains as the ground of human belief and judgment.‡

* Hoffmans Course of Legal Study, vol. i. p. 364.

† Benthan.'s Rationale of Judicial Evidence, b. i. ch. vi. s. 1., and see in Kirwan's Logic, part iii. ch. vii. s. 21, a proposed scale of testimonial probability.

‡ See some remarks on this passage in a learned paper "On the Measure of the Force of Testimony in cases of Legal Evidence," by John Tozer, Esq., M. A., Camb. Phil. Trans. vol. viii.

But, as has been already intimated, there is another sense in which the word probability is often used, and in which it denotes CREDIBILITY or INTERNAL PROBABILITY, and expresses our judgment of the accordance or similarity of events with which we become acquainted through the medium of testimony, with facts previously known by experience.*

The results of EXPERIENCE are, expressly or impliedly, assumed as the standard of credibility in all questions dependent upon moral evidence. By means of the senses and of our own consciousness we become acquainted with external nature, and with the characteristics and properties of physical things and moral beings, which are then made the subjects of memory, reflection, and other intellectual operations; and ultimately, the inferences and observations to which they lead, are reduced to general principles, and become the basis and standard of comparison in similar circumstances. The groundwork of our reasoning, is our confidence in the permanence of the order of nature, and in the existence of moral causes, which operate with unvarying uniformity, not inferior to, and perhaps surpassing even, the stability of physical laws; though, relatively to our feeble and limited powers of observation and comprehension, and on account of the latency, subtlety, and fugitiveness of mental operations, and of the infinite diversities of individual men, there is apparently more of uncertainty and confusion in moral than in material phænomena.†

[*11] *Experience comprehends, not merely the facts and deductions personal observation, but the observations of mankind at large of every age and country. It would be absurd to disbelieve and reject as incredible the relations of events, because such events have not occurred within the range of individual experience. We may remember the unreasonable incredulity of the king of Siam, who, when the Dutch ambassador told him that in his country the water in cold weather became so hard that men walked upon it, and that it would even bear an elephant, replied, "Hitherto I have believed the strange things you have told me, because I look upon you as a sober fair man, but now I am sure you lie.‡"

By experience facts or events of the same character are referred to causes of the same kind; by ANALOGY facts and events similar in some, but not in all of their particulars to other facts and occurren-

* Abercrombie on the Intellectual Powers, part ii. s. 3.

† Hampden's Lectures introductory to the study of Moral Philosophy, p. 150. Abercrombie's Philosophy of the Moral feelings, Prelim. Obs. s. ii.

‡ Locke on the Human Understanding, b. iv. ch. xv. s. 5.

ces, are concluded to have been produced by a similar cause: so that analogy vastly exceeds in its range, the limits of experience in its widest latitude, though their boundaries may sometimes be coincident and sometimes undistinguishable. It has been profoundly remarked that "in whatever manner the province of experience, strictly so called, comes to be thus enlarged, it is perfectly manifest that, without some provision for this purpose, the principles of our constitution would not have been duly adjusted to the scene in which we have to act. Were we not formed as eagerly to seize the resembling features of different things and different events, and to extend our conclusions from the individual to the species, life would elapse before we had acquired the first rudiments of that knowledge which is essential to our animal existence.*" Every branch of knowledge presents instructive examples of the extent to which *this [*12] mode of reasoning may be securely carried. Newton, from having observed that the refractive forces of different bodies follow the ratio of their densities, was led to infer the combustibility of the diamond, ages before the mechanical aids of science were capable of verifying his prediction; nor is the sagacity of the conjecture less striking, because this correspondence has been discovered not to be without exception. The scientific observer, from the inspection of shapeless fragments, which have mouldered under the suns and storms of ages, constructs a model of the original in its primitive magnificence and symmetry. A profound knowledge of comparative anatomy enabled the immortal Cuvier, from a single fossil bone, to describe the structure and habits, of many of the animals of the antediluvian world. In like manner, an enlightened knowledge of human nature often enables us, on the foundation of apparently slight circumstances, to follow the tortuous windings of crime, and ultimately to discover its guilty author, as infallibly as the hunter is conducted by the track to his game.

The following pertinent and instructive observations may advantageously close this part of our subject, comprehending, as they do, everything that can be usefully adduced in illustration of the necessity and value of the principle of analogy. "In all reasonings concerning human life, we are obliged to depend on analogy, if it were only from that uncertainty, and almost suspension of judgment, with which we must hold our conclusions. We can seldom obtain that number of instances which is requisite here to establish an inference

* Stewart's Elements, vol. ii. ch. ii. s. iv.

indisputably. The conduct of persons or of parties may have been attended by certain antecedents and certain results in the examples before us; still the state of the case may be owing, not so much to that conduct, as to other causes, which are shut out of our view,
[*13] when our attention is fixed on the particular *examples adduced for the purpose of the inference. We must thus be strictly on our guard against transferring to other cases, anything merely contingent and peculiar to the instances on which our reasoning is founded. And this is what analogical reasoning requires and enables us to do. If rightly pursued, it is employed, at once, both in generalizing and discriminating; in the acute perception at once of points of agreement and points of difference. The acmé of the philosophical power is displayed in the perfect co-operation of these two opposite proceedings. We must study to combine in such a way as not to merge real differences; and so to distinguish as not to divert the eye from the real correspondence."*

It may be objected, that the minds of men are so differently constituted, and so much influenced by differences of experience and culture, that the same evidence may produce in different individuals very different degrees of belief; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that moral certitude is not the same fixed and unvarying standard, alike in every individual; that scepticism, and credulity, are modifications of the same principle, and that to a certain extent this objection is grounded in fact; but, nevertheless, the psychological considerations which it involves have but little alliance with the present subject; the argument, if pushed to its extreme, would go to introduce universal doubt and distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions; but in the one case, as well as in the other, there is a general agreement and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, *not what may be the *possible* effect of evidence upon
[*14] minds *peculiarly* constructed, but what ought to be its fair result with men such as the generality of civilized men are.

It is of no moment, in relation to criminal jurisprudence, that expression cannot be given to the inferior degrees of belief. The doc-

* Hampden's Lectures, *ut supra*, p. 178.

trine of chances, and nice calculation of probabilities, cannot, except in a few cases, and then only in a very general and abstract way, be applied to human actions, which are essentially unlike, and dependent upon peculiarities of persons and circumstances, which render it impossible to assign to them a precise value, or to compare them with a common numeral standard; nor are they capable in any degree, or under any circumstances, of being applied to actions which infer legal responsibility. In the common affairs of life, men are frequently obliged, from necessity and duty, to act upon the lowest degree of belief; and, as Mr. Locke justly observes, "He that will not stir, till he infallibly knows the business he goes about will succeed, will have little else to do, but to sit still and perish*." But in such cases our judgments commonly concern ourselves, and our own motives, duties and interests; while in the administration of penal justice, the magistrate is called upon to apply to the conduct of *others* a rule of action, applicable to a given state of, acts, where external and sometimes ambiguous indicia alone constitute the grounds of judgment. In the application of every such rule, the certainty of the facts is pre-supposed, and is its only foundation and vindication; and upon any lower degree of assurance, its application would be arbitrary and indefensible.

* Essay on the Human Understanding, b. iv. ch. xiv. s. 1.

[*15] *CHAPTER II.

CIRCUMSTANTIAL EVIDENCE.

SECTION I.

ESSENTIAL CHARACTERISTICS OF CIRCUMSTANTIAL EVIDENCE.

THE epithets DIRECT and INDIRECT or CIRCUMSTANTIAL, as applied to testimonial evidence, have been sanctioned by such long and general use, that it might appear presumptuous to question their accuracy, as it would perhaps be impracticable to substitute others more appropriate. But assuredly these terms have frequently been very indiscriminately applied, and the misuse of them, has occasionally been the cause of lamentable results; it is therefore essential, accurately to discriminate their proper application.

On a superficial view, direct and indirect or circumstantial, would appear to be *distinct* species of evidence; whereas, these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence, is of a nature identically the same with direct evidence; the distinction is, that by DIRECT EVIDENCE is intended evidence which applies directly to the fact which forms the subject of inquiry, the *factum probandum;* CIRCUMSTANTIAL EVIDENCE is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which *such other fact is therefore inferred.

[*16] A witness deposes that he saw A. inflict on B. a wound, of which he instantly died; this is a case of direct evidence. B. dies of poisoning; A. is proved to have had malice against him, and to have purchased poison, wrapped in a particular paper, the paper is found in a secret drawer, but the poison gone. The *evidence* of these facts is *direct;* the facts themselves are *indirect* and circumstantial, as applicable to the inquiry whether a murder has been committed, and whether it was committed by A.

So rapid are our intellectual processes, that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment, and the train of reasoning of which it is the result; and the one appears to succeed the other instantaneously, by a kind

of necessity, as the thunder follows the flash. This fact obtains most commonly in respect of matters which have been frequently the objects of mental association.

In matters of direct testimony, if credence be given to the relators, the act of hearing and the act of belief though really not so, seem to be contemporaneous. But the case is very different when we have to determine upon circumstantial evidence, the judgment in respect of which is essentially *deductive* and *inferential*. There is no apparent necessary connection between the facts and the deduction; the *facts* may be true, and the *deduction* erroneous, and it is only by comparison with the results of observation in similar or analogous circumstances, that we acquire confidence in the accuracy of our conclusions.

The term PRESUMPTIVE is frequently used as synonymous with CIRCUMSTANTIAL EVIDENCE; but it is not so used with strict accuracy. The word presumption, *ex vi termini*, imports an *inferenee* from facts; and the adjunct presumptive, as applied to evidentiary facts, *implies* the certainty of some *relation* between the facts and thei nference

*Circumstances generally, but not necessarily, lead to particular inferences; for the facts may be indisputable, and yet [*17] their relation to the principal fact may be only apparent and not real; and even when the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species.

The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other supposition than that of the truth of the fact which it is adduced to prove; the mode of argument resembling the method of demonstration by the *reductio ad absurdum*. But this is a part of the subject which will more appropriately admit of amplification in a future part of this essay.

SECTION 2.

PRESUMPTIONS.

It is essential to a just view of the subject that our notions of the nature of PRESUMPTIONS be precise and distinct. A PRESUMPTION is a probable consequence, drawn from facts, (either certain, or proved by direct testimony,) as to the truth of a fact alleged, but of which there is no direct proof. It follows, therefore, that a pre-

sumption of any fact is an inference of that fact from others that are known*. The word presumption, therefore, inherently imports a conclusion of the judgment; and it is applied to denote such facts or moral phænomena, as from experience we know to be invariably or commonly connected with some other related fact. A wounded and bleeding body is discovered; it has been plundered; wide and deep footmarks are found in a direction proceeding from the body; or a person is seen running from the spot. In the one case are observed *marks
[*18] of flight, in the other is seen the fugitive, and we know that guilt naturally endeavors to escape detection. These circumstances induce the presumption that crime has been committed; the presumption is a conclusion or consequence from the circumstances. The antecedent circumstances therefore are one thing, the presumption from them another and different one. Of presumptions afforded by moral phænomena, a memorable instance is recorded in the judgment of Solomon, whose knowledge of the all-powerful force of maternal love supplied him with an infallible criterion of truth†. So, when Aristippus, who had been cast away on an unknown shore, saw certain geometrical figures traced in the sand, his inference that the country was inhabited by people conversant with mathematics was a presumption of the same nature‡. It is evident, that this kind of reasoning, is not peculiar to legal science, but is a logical process common to every subject of human investigation§.

All presumptions connected with human conduct are inferences founded upon the observation of man's nature as a sentient being and a moral agent; and they are necessarily infinite in variety and number, differing according to the diversities of individual character and to the innumerable and ever-changing situations and emergencies in which men are placed. Hence the importance of a knowledge of the instincts, affections, desires, and moral capabilities of our nature, to the correct deduction of such presumptions as are founded upon them, and which are therefore called NATURAL PRESUMPTIONS.‖

LEGAL PRESUMPTIONS are founded upon natural presumptions, being such natural presumptions as are *connected with
[*19] human actions so far as they are authoritatively constituted by the legislator or deduced by the magistrate.

* Per Abbot, C. J. in Rex *v.* Burdett, iv. B. and Ald. 151.

† Domat's Civil law, b. iii. tit. 6.

‡ Gambier's Introd. to the study of Moral Evidence, p. 55.

§ Greenleaf's Law of Ev. vol. i. § 44. (ed. 2.)

‖ Mascardus de Probationibus, vol. iii. Conclusio MCCXXVI.

The civilians divided legal presumptions into two classes, namely, *præsumptiones juris et de jure*, and *præsumptiones juris* simply.

Presumptions of the former class were such as were considered to be founded upon a connection and relation so intimate and certain between the fact known and the fact sought, that the latter was deemed to be an infallible consequence from the existence of the first. Such presumptions were called *præsumptiones juris*, because their force and authority were recognized by the law; and *de jure*, because they were made the foundation of certain specific legal consequences,* against which no argument or evidence was admissible; while *res præsumptiones juris* simply, though deduced from facts characteristic of truth, were always subject to be overthrown by proof of facts leading to a contrary presumption.

In matters of property, the principal modifications of which are matters of positive institution, the laws of every country have created artificial legal presumptions, grounded upon reasons of policy and convenience, to prevent social discord and to fortify private right. The justice and policy of such regulations have been thus eloquently enforced: "Civil cases regard property: now, although property itself is not, yet almost everything concerning property, and all its modifications, is of artificial contrivance. The rules concerning it, become more positive, as connected with positive institutions. The legislator therefore always, the jurist frequently, may ordain certain methods, by which alone they will suffer such matters to be known and established; because, their very essence, for the greater part, *depends on the arbitrary [*20] conventions of men. Men act on them with all the power of a creator over his creatures. They make fictions of law and presumptions of law (*præsumptiones juris et de jure*) according to their ideas of utility—and against those fictions, and against presumptions so created, they do and may reject all evidence.†"

But in penal jurisprudence, man as a physical being and a moral agent, such as he is by natural constitution and by the influences of social condition, is the subject of inquiry. Punitive justice is applied to injurious actions proceeding from malignity of purpose, and not to physical actions merely. It has been said with great force and accuracy, that "where the subject is of a physical nature,

* Menochius De Præsumptionibus, lib. i. q. 3. Essai sue la nature, les différentes espèces, et les divers degrés de force des Preuves, par Gabriel, p. 369.

† Burke's Works, vol. ii. p. 623. (Ed. 1834, printed by Holdsworth and Ball.) Mascardus De Probationibus, vol. iii. Conclusio MCCXXVIII.

or of a moral nature, independent of their conventions, men have no other reasonable authority, than to register and digest the results of experience and observation ;" and that " the presumptions which belong to criminal cases are those natural and popular presumptions which are only observations turned into maxims, like adages and apophthegms, and are admitted (when their grounds are established) in the place of proof, where better is wanting, but are to be always overturned by counter proof."* Hence therefore a third class of presumptions, which the civilians called *præsumptiones hominis*, because they were inferred by the sagacity and discretion of the judge from the facts judicially before him. Such presumptions are in fact natural presumptions simply, deriving their force from that relation and connection which are recognized and acknowledged by the unsophisticated reason of all observing and reflecting men.

[*21] *Presumptions of every kind, to be just, must be dictated by nature and reason ; and it is impossible, without a dereliction of every rational principle, to lay down positive rules of presumption, where every case must of necessity be connected with peculiarities of personal disposition and of concomitant circumstances, and be therefore irreducible to any fixed principle. In criminal jurisprudence, therefore, arbitrary presumptions should be sparingly, if ever admitted ; and when they are so, they not unfrequently work injustice. It would be as unreasonable to subject human actions to unbending rules of presumption, as to prescribe to the commander of a ship inflexible rules for his conduct, without any latitude of discretion in the unforeseen and innumerable accidents and contingencies of the tempest and the ocean. Where a peremptory presumption of legal guilt is not pernicious and unjust, it is in general at least unnecessary ; for, if it be a fair conclusion of the reason, it will be adopted by the tribunals, without the mandate of the legislature. There may, no doubt, be cases, where the provisions of the law are peculiarly liable to be defeated or evaded, by subtle contrivances and shifts most difficult of prevention. But, even in such cases, legal presumptions can only be justifiable where the proximate substituted fact of presumption is of a guilty character *per se*, and would afford, even in the absence of legal enactment, a strong moral ground of presumption indicative of the particular act of criminality intended to be repressed,† so that even in such

* Burke's Works, vol. ii. p. 623. Mascardus De Probationibus, vol. iii. Conclusio MCCXXVIII.

† Traité théorique et pratique des Preuves, par M. E. Bonnier, p. 629

cases the necessity and expediency of fixed legal presumptions may be questionable.

It is impossible to recall without horror the sanguinary law* which made the concealment of the death of an illegitimate child by its mother, conclusive evidence of murder, unless she could make proof by one witness at least, that *the child was [*22] born dead; whereas in truth it affords not even the slightest presumption to warrant such a conclusion, since it is more natural and more just to attribute the suppression to a desire to conceal female shame and to escape open dishonour. Numerous collateral considerations concur to show the cruelty and injustice of this particular presumption, which was suggested by a corresponding edict of Henry II. of France,† and to the discredit of our country has been but recently expunged from the statute book.‡

As evidentiary circumstances and their combinations are infinitely varied, so also are the presumptions to which they lead; and a complete enumeration would in either case be impracticable. The writers on the civil law have made a comprehensive and instructive collection of facts and inferential conclusions, in relation to a vast number of actions connected with legal accountability.§ But many things advanced by those laborious and elaborate authors have relation to a state of society, and to legal institutions and modes of procedure, wholly dissimilar from our own. The law of England admits of no such thing as the *semi-plena probatio*, founded on circumstances of conjecture and suspicion only, which in many countries governed by the Roman law were held to warrant the infliction of torture with a view to compel admissions and complete imperfect proof. Hence the total inapplicability with us of the sub-divisions of *indicia*, *signa*, *adminicula*, *conjecturæ*, *dubia*, and *suspiciones*, which are found in the writers of other countries whose jurisprudence is founded upon that of Rome—subdivisions which appear to be arbitrary, vague, and useless. But it is manifest that, under legal institutions *which admitted of compulsory self-accu- [*23] sation, in order to complete proof insufficient and inconclusive in itself, and where the laws were administered by a single judge, without the salutary restraints of publicity and popular observation,

* Stat. 21 Jac. I. c. 27.

† Domat, b. iii. tit. 6. ‡ St. ix. G. IV. c. 31. s. 14.

§ Aureum Repertorium De Præsumptionibus. Dom. Hippolyto Bonacossa (Venet. 1580.) and, inter alia, the several works of Menochius, Mascardus, Alciatus, De Præsumptionibus.

an accurate and elaborate record of the multitudinous actions and occurrences which had been submitted to the criminal tribunals, operated as important limitations upon the tyranny and inconstancy of judicial discretion.

It is calculated to excite surprise, that arbitrary technical rules should ever have been adopted, for estimating the force and effect of particular facts as leading to presumptions ; a matter purely one of reason and logic. It is probable nevertheless, that the attempt originated in the desire to escape a still greater absurdity. "*Testis unus, testis nullus*," "*unus testis non est audiendus*," were fundamental maxims of the text writers on the Civil and Canon Laws, and of most ancient codes*, as they still are of judicial procedure in many parts of Europe†. Since presumptions have not same force as direct evidence, it was hence supposed to be required, as a logical sequence, that there should be concurrence of three presumptions, as imaginary equivalent for the testimony of two ocular witnesses, where such testimony was not to be had. It is discreditable to the state of moral and legal science that these absurd and antiquated notions, worthy of the darkest ages of society, should have been countenanced and perpetuated in the legislation of several of the nations of Europe even in the present century‡. It
[*24] is obvious that a *single presumption may be conclusive, and that an accumulation of many presumptions may be of but little weight. The simplest and most elementary dictates of common sense require that presumptions should not be numbered merely, but that they should be weighed according to the principles which are applied in estimating the effect of testimonial evidence.

The prevalence of these fallacious methods of judging of the force of evidence, explains the foundation of the practice, abhorrent to every principle of judicial integrity, and which still extensively prevails, of condemning to a minor punishment persons who may be innocent, but against whom there may exist apparent grounds of strong presumption, through not that exact kind and amount of proof which the rules of evidence arbitrarily and unreasonably re-

* Deut. ch.. xvii. 6, 7; xix. 15. Numb. ch. xxxv. 30. Michaelis on the Laws of Moses, by Smith, vol. iv. Art. ccxcix.

† Code Hollandais, 1838; Code Pénal d' Autriche, Code de Baviére, and many other German Codes.

‡ Code Criminel de Prusse, 1805; Code Pénal d' Autriche, 1833; and see Bonnier, *ut supra*, p. 610

quire; as if a middle term in criminal jurisprudence were not an absurdity and self-contradictory*.

The unreasonable stress, which in many countries, whose criminal procedure is derived from the Civil Law, is laid upon the confession of the accused, and the unwarrantable means which are resorted to, in order to obtain it, are the natural results of arbitrary and unphilosophical rules of evidence, which necessarily have the effect of closing many of the channels of truth; and frequently render it so difficult to obtain full legal proof of crime, that a late eminent jurist and criminal judge declared, that unless a man chose to perpetrate his crimes in public, or to confess them, he need not fear a conviction†.

[*25] *Attempts have been made by our own judicial writers, but with no useful result, to classify presumptions in a more general way under terms expressive of their effect,‡ as VIOLENT or NECESSARY, PROBABLE or GRAVE, and SLIGHT.§ But this arrangement is specious and fanciful rather than practical and real; nor is it entirely accurate, since a presumption may be violent and yet not necessary.‖ A more precise and intelligible classification of presumptions is into violent or strong, and slight.¶ But it is impossible thus to classify more than a comparatively few of the infinite variety of circumstances connected with human actions and motives, or to lay down rules for distinguishing presumptions of one of these classes from those of another; and the terms of designation, from the inherent imperfections of language, although not wholly destitute of utility, are unavoidably defective in precision. We can therefore only usefully apply these epithets as relative terms; and the effect of particular facts must of necessity depend upon the reality and closeness of the connection between the principal and secondary facts, and upon a variety of considerations peculiar to each individual case, and can no more be predicted than the

* See several cases of the kind in Narratives of Remarkable Criminal Trials, translated from the German of Anselm Ritter Von Feuerbach, by Lady Duff Gordon. At Berne, in 1842, a man accused of the crime of poisoning was sentenced to six years' imprisonment, as *vehementement suspect*.

† Ed. Rev. lxxxii. p. 330; and see in Christison on Poisons, p. 61. ed. 2, a case where the crime of murder by poisoning was considered by the court as not fully proved because the prisoner would not confess, but on account of the probability of his guilt he was condemned to fifteen years' imprisonment.

‡ Bentham's Rationale of Judicial Evidence, b. i. ch. vi.

§ Coke on Litt. 6. b. Blackstone's Comm. vol. iv. p. 353.

‖ See Menochius de Præs., lib. 1. q. 3. nos. 1, 2, 3, and Gabriel, *ut supra*, p. 373.

¶ Best on Presumptions, p. 40, and the authorities cited.

boundaries can be defined of the separate colours which form the solar bow.

By various statutes, many acts are made legal presumptions of guilt, and the onus of proving any matter of defence is expressly cast upon the party accused; but, with these exceptions, the truth of every accusation is determined by the voice of a jury, [*26] upon consideration of the intrinsic and *independent merits of each particular case, acting upon those principles of reason and judgment by which mankind are governed in all other cases where the same intellectual process is called into exercise, unfettered by any obligatory and inflexible presumptions. The inexpediency and inefficacy of positive presumptions, as indications of the criminality of intention, in which alone consists the essence of legal guilt, have been thus exposed with equal force and elegance by the hand of a master:—"The connection of the intention and the circumstances, is plainly of such a nature, as more to depend on the sagacity of the observer than on the excellency of any rule. The pains taken by the civilians on that subject have not been very fruitful; and the English law-writers have, perhaps as wisely, in a manner abandoned the pursuit. In truth, it seems a wild attempt to lay down any rule for the proof of intention by circumstantial evidence."*

SECTION 3.

RELATIVE VALUE OF DIRECT AND INDIRECT OR CIRCUMSTANTIAL EVIDENCE.

The foregoing observations naturally lead to a comparison of the relative value of Direct and Indirect or Circumstantial Evidence; an inquiry which becomes the more necessary, on account of some novel and questionable doctrines which have received countenance even from the judgment-seat.

The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence; a conclusion which seems to fol- [*27] low necessarily from the very nature of *the different kind of evidence.† But language of a directly contrary

* Burke's Works, *ut supra*, vol. ii. p. 623.

† Menochius De Præsumptionibus, lib. 1. quest. 1. 6. Mascarbus De Probationibus

import has been so often used of late, by authorities of no mean note, as to have become almost proverbial.

It has been said that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither.*" "Circumstances," says Paley, "cannot lie.†" It is astonishing that sophisms like these should have passed current without animadversion. The "circumstances" are assumed to be in every case established, beyond the possibility of mistake; and it is implied, that a circumstance established to be true, possesses some *mysterious force* peculiar to facts of a certain class. Now, a circumstance is neither more nor less than a minor fact, and it may be admitted of all facts, that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth, the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that "circumstances are inflexible proofs," but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked, that circumstances and facts of every kind must be proved by human testimony; that although "circumstances cannot lie," the narrators of them may; and that, like witnesses of all other facts, they may be biased or mistaken. So far then, circumstantial possesses no advantage over direct evidence.

*A distinguished statesman and orator has advanced in [*28]
unqualified terms the proposition, supported, he alleges,
by the learned, that "when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof."‡ Paley has said, with more of caution, that "a concurrence of well authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords."§ Mr. Baron Legge, upon the trial of Mary Blandy for the murder of her father by poison,‖ told the jury that where "a violent presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, *because facts cannot lie.*"

vol. i. quest. 8. n. 8. Burnett on the C. L. of Scotland, p. 506. Starkie's Law of Evidence, vol. i. pp. 515, 521. (2nd ed.) The Theory of Presumptive Proof; Benth, Jud. Ev. vol. iii. ch. xv. s. iv.

* Burnett on the C. L. of Scotland, p. 523.

† Principles of Moral and Political Philosophy, b. vi. ch. ix.

‡ Burke's Works, *ut suyra*, vol. ii. p. 624.

§ Principles of Moral and Political Philosophy, b. vi. ch. ix.

‖ State Trials, vol. xviii. p. 1187.

Mr. Justice Buller, in his charge to the jury in Captain Donellan's case, declared, "that a presumption which *necessarily* arises from circumstances is very often more convincing and more satisfactory than any other kind of evidence, because it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part if not all of those circumstances.*"

It is obvious that the doctrine laid down in these several passages is propounded in language which not only does not accurately state the question, but implies a fallacy, and that extreme cases—the strongest ones of circumstantial, and the weakest of positive evidence—have been selected for the illustration and support
[*29] of a general position. *"A presumption which *necessarily* arises from circumstances" cannot admit of dispute, and requires no corroboration; but then it cannot in fairness be contrasted with and opposed to positive testimony, unless of a nature equally cogent and infallible. If evidence be so strong as *necessarily* to produce certainty and conviction, it matters not by what *kind* of evidence the effect is produced; and the intensity of the proof must be precisely the same, whether the evidence be direct or circumstantial. It is not intended to deny that circumstantial evidence affords a safe and satisfactory ground of assurance and belief; nor that in many individual instances it may be superior in proving power to other individual cases of proof by direct evidence. But a judgment based upon circumstantial evidence cannot, in any case, be more satisfactory than when the same result is produced by direct evidence, free from suspicion of bias or mistake.

Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the anno-domini water-mark usually contained in the fabric of writing-paper, and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind have recently occurred) that issues of paper have taken place bearing the water-mark of the year succeeding that of its distribution,—a striking exemplification of the fallacy of some of the arguments which have been remarked upon. How often

* Gurney's Report of the Trial of John Donellan, Esq. for the wilful murder of Sir Theodosius Edward Allesley Broughton, Bart., at the Assize at Warwick, March 30th, 1781.

has it been iterated in such cases, that circumstances are inflexible facts, and that facts cannot lie!

The proper effect of circumstantial, as compared with direct evidence, was thus more accurately stated by Lord Chief Baron Macdonald. "When circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the *minds of a jury, it MAY BE proof of [*30] a more satisfactory sort than that which is direct. In some lamentable instances it has been known that a short story has been got by heart, by two or three witnesses; they have been consistent with themselves, they have been consistent with each other, swearing positively to a fact, which fact has turned out afterwards not to be true. It is almost impossible for a variety of witnesses, speaking to a variety of circumstances, so to concert a story, as to impose upon a jury by a fabrication of that sort, so that where it is cogent, strong, and powerful, where the witnesses do not contradict each other, or do not contradict themselves, it MAY BE evidence more satisfactory than even direct evidence; and there are more instances than one where that has been the case."* In another case the same learned judge said, "where the proof arises from a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under *some circumstances* direct evidence MAY BE.†"

But, in truth, direct and circumstantial evidence ought not to be placed in contrast, since they are not mutually opposed; for evidence of a circumstantial and secondary nature can never be justifiably resorted to, except where evidence of a direct and therefore of a superior nature is unattainable.

The argument founded upon the abundance of the circumstances, and the consequent opportunities of contradiction which they afford, belongs to another part of the subject. While each of these incidents adds greatly to the probative force of circumstantial evidence in *particular cases*, they have clearly no connection with an inquiry into the value of circumstantial evidence in the *abstract*. However numerous may be the independent circumstances to *which the witnesses depose, the result cannot be of a different kind [*31] from, or superior to, that strong moral assurance, which is

* Rex *v.* Patch, Surrey Spring Assizes, 1800.

† Rex *v.* Smith, for Arson, Old Bailey, June 15, 1813. Short hand Report by Gurney.

the consequence of satisfactory proof by direct testimony, and for which, if such proof be attainable, every tribunal, every reasonable mind would reject any attempt to substitute indirect or circumstantial evidence, as inadmissible, and as affording the strongest reason for suspicion and disbelief.

It has been said, that " though in most cases of circumstantial evidence there be a *possibility* that the prisoner may be innocent, the same often holds in cases of direct proof, where witnesses may err as to identity of person, or corruptly falsify, for reasons that are at the time unknown.*" This observation is unquestionably true. Even the testimony of the senses, though it afford the safest ground of moral assurance, cannot be implicitly depended upon, even where the veracity of the witnesses is above all suspicion. Sir Thomas Davenant, an eminent barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men, whom he charged with robbing him in the open daylight. But it was proved by the most conclusive evidence, that the men on trial were, at the time of the robbery, at so remote a distance from the spot that the thing was impossible. The consequence was, that the men were acquitted, and some time afterwards the robbers were taken, and the articles stolen found upon them. Sir Thomas, on seeing these men, candidly acknowledged his mistake, and it is said gave a recompense to the persons he prosecuted, and who so narrowly escaped conviction†. It is probable that Sir Thomas was deceived by the broad glare of sun-light, but there can be no doubt of the sincerity of his impressions.

[*32] *Many similar instances are upon record of the fallibility of human testimony, even as to matters supposed to be grounded upon the clearest evidence of the senses, and where the misconception has related to the substantive matters of judicial inquiry. It has been said with the strictest philosophical truth, that " proof is nothing more than a presumption of the highest order†." But these considerations, instead of establishing the superior efficacy of circumstantial evidence, seem irresistibly to lead to the conclusion that it is, *a fortiori*, more probable that similar misconception may take place as to *collateral* facts and incidents, to which perhaps particular attention may not have been excited.

* Burnett on the C. L. of Scotland, p. 524.

† Rex *v.* Wood and Brown : State trials, vol. xxviii. p. 819. Annual Register, 1784.

* Per Lord Erskine, in the Banbury Peerage Case.

There is another source of fallacy and danger, to which, as already intimated, circumstantial evidence is peculiarly liable, and of which it is necessary to be especially mindful. Where the evidence is direct, if the testimony be credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved;—frequently of a most delicate and perplexing character,—liable to numberless causes of fallacy, inherent in the very nature of the human mind itself, which has been profoundly compared to the disturbing power of an uneven mirror, imparting its own nature upon the true nature of things*. Mr. Baron Alderson, upon a trial of this kind, said, "it was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt," he said, "to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some [*33] little link that is wanting, to take for granted some fact consistent with its previous theories, and necessary to render them complete†."

It may be objected that the foregoing observations tend to create distrust in all human testimony. While it must be admitted that the senses cannot be implicitly depended upon, it is certain that their liability to mistake may be greatly diminished by habits of accurate observation and relation. The general conformity of our impressions to truth and nature, and the universal opinion and practice of mankind, establish the reasonableness and propriety of our general faith in testimonial evidence. The interest to which all controverted matters of fact give occasion, is a manifestation of the preference in the human mind of truth to falsehood; and finally, the number of mistaken inferences from the testimony of the senses is inconceivably small, as compared with the almost infinite number of judgments which are correctly drawn from evidence of the kind in question.

* Novum Organum, lib. i. Aph. 41, 45. Best on Presumptions, p. 255; and see Bentham's Jud. Ev. vol. iii. b. v. ch. xv. s. iv.

† Reg. v. Hodges, 2 Lewin's C. C. 227.

SECTION 4.

OF THE SOURCES AND CLASSIFICATION OF CIRCUMSTANTIAL EVIDENCE.

In the present state of knowledge there can be little danger of mistake as to the legitimate subjects of human belief; but how melancholy is the degradation of the human intellect exhibited in the records of superstition, imposture and delusion, of enthusiasm and credulity, of judicial darkness and cruelty, in the pages of our own history, as well as in those of every other nation!

[*34] *A profound ignorance of the laws of nature, an inability to account for the origin of moral evil and to reconcile its existence with the divine attributes, and the impulse to avenge wrongs for which human institutions afforded no remedy led to an universal belief in the supernatural interposition of the Supreme Being on behalf of his injured moral offspring. Of this persuasion, augury, divination, judicial combat, the various forms of trial by ordeal, the supposed intimations of truth conveyed by means of apparitions, and dreams, the bleeding of a corpse in the presence of the murderer, and his reluctance to touch it,* were so many manifestations; while with the wildest inconsistency, the belief was equally general, in the existence and influence of witchcraft and other modes of demoniacal agency over the minds and actions of men. The history of all nations affords lamentable memorials of judicial murders, the natural consequences of such mistaken and degrading views. Without adverting to other reasons, it is conclusive against all departure by the Supreme Being from the ordinary course of his administration in cases of this nature, that so many instances of erroneous conviction and execution have occurred in all ages and in all countries.

The course of external nature, and the mental and physical constitution of man, and his actions and moral and mechanical relations, are the only true sources of those facts which constitute circumstantial evidence.

In every inquiry into the truth of any alleged fact, as to which our means of judgment are secondary facts, there must exist relations and dependencies, which are inseparable from the principal fact, and which will commonly be manifested by external appearances. No action of a rational being is indifferent or independent; and every such action must necessarily be connected with antece-

* See Rex *v.* Standsfield, 11 St. Tr., 1403; and Rex *v.* Okeman, 14 *ibid.* 1324.

dent, *concomitant, and subsequent conditions of mind, and [*35]
external circumstances, of the actual existence of which,
though it may not invariably be apparent, there can be no doubt.

A crime, so far as it falls within the cognizance of human tribunals, is an *act* proceeding from a wicked *motive;* it follows therefore that in every such act, there must be one or more voluntary agents; that the act must have corresponding relations to some precise moment of time and portion of space; that there must have existed inducements to guilt, preparations for, and objects and instruments of crime;—and that these, the means of disguise, flight, or concealment, the possession of plunder or other fruits of crime, and innumerable other particulars connected with individual conduct, and with moral, social, and physical relations, may afford materials for the determination of the judgment. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. "All the acts of the party, all things that explain or throw light on these acts, all the acts of others relative to the affair, that come to his knowledge and may influence him; his friendships and enmities, his promises, his threats, the truth of his discourses, the falsehood of his apologies, pretences and explanations; his looks, his speech, his silence where he was called to speak; everything which tends to establish the connection between all these particulars;—every circumstance, precedent, concomitant, and subsequent, become parts of circumstantial evidence. These are in their matter infinite, and cannot be comprehended within any rule, or brought under any classification."*

Evidentiary facts of a circumstantial nature are susceptible only of a very general arrangement, into two classes; namely,
first, moral indications, afforded by the relations, *and lan- [*36]
guage, and conduct of the party; and, secondly, facts
which are apparently extrinsic, and mechanical, and independent of moral conduct and demeanour: and each of these classes of facts may be further considered, as such facts are inculpatory or exculpatory. But this division, indefinite as it is, is grounded upon the apparent rather than the real qualities of actions, and cannot be regarded as strictly accurate; since all the actions of a rational agent are prompted by motives, and are therefore really moral indications, though it be not always practicable to develope their moral relations.

* Burke's Works, ii. 623.

[*37]

*CHAPTER III.

INCULPATORY MORAL INDICATIONS.

Although, for reasons which have been explained, any enumeration of facts as invariably conjoined with authoritative presumptions would be useless and nugatory, it is important in illustration of the general principles which determine the relevancy and effect of circumstantial evidence, to notice some particulars of moral conduct, of frequent occurrence in courts of criminal jurisdiction, which are popularly, and on that account judicially considered as leading to important and well-grounded presumptions.

These circumstances may be considered under the heads of motives to crime, declarations indicative of intention, preparations for the commission of crime, possession of the fruits of crime, refusal to account for appearances of suspicion, or unsatisfactory explanations of such appearances, evidence indirectly confessional, and the suppression, destruction, simulation, and fabrication of evidence.

SECTION 1.

MOTIVES TO CRIME.

As there must necessarily pre-exist a motive to every human action, it is proper to comprise in the class of moral indications, those particulars of external situation which are usually observed, under given circumstances, to operate as motives and inducements to the commission of crime, as well as such more unequivocal indications from *language and conduct as directly and pointedly manifest a relation between the deed and the mind of the actor.

[*38]

Motives are with relation to moral conduct what physical power is to mechanics; and both of these kinds of impulse are equally under the influence of known laws. But in reasoning upon motives and their resulting actions, it is impracticable to obtain the same sure data as when material phænomena only are involved, since it is not possible to discover all the modifying circumstances of human conduct, or to assign with unerring certainty the true character of the

motives from which they spring. Nevertheless, we naturally, reasonably, and safely, judge of men's motives by their conduct, as we conclude from the nature of the stream the qualities of the fountain whence it proceeds.

An evil motive constitutes in law as in morals, the essence of guilt; and the existence of an inducing motive for the voluntary acts of a rational agent, is assumed as naturally as secondary causes are concluded to exist for material phænomena. The predominant desires of the mind are invariably followed by corresponding volitions and actions. It is therefore indispensable, in the investigation of moral actions, to look at all the surrounding circumstances which connect the supposed actor with other persons and things, and may have influenced his motives.

The usual inducements to crime, are the desire of avenging real or fancied wrongs,—of obtaining some object of desire which rightfully belongs to another,—or of preserving reputation, either that of general character or the conventional reputation of sex or profession. Selfishness and malignity are subtle as well as importunate casuists; and even if it were possible to enumerate the infinite ways in which they lead to action, it would be irrelevant to do so, since the subject properly belongs to a distinct department of moral science. It is always, however, a satisfactory circumstance of corroboration, when in connection *with convincing facts an apparently adequate motive can be assigned; but, as the operations of the mind [*39] are invisible and intangible, it is impossible to go further, and there may be motives which no human being beside the party himself can divine. Undue or even great stress must not be laid upon the existence of circumstances supposed to be indicative of motives; nor ought it in any case to supersede the necessity for the same quantity of proof, as would be deemed necessary in the absence of all evidence of such a stimulus. Suspicion—too readily excited by the appearance of supposed inducements—is incompatible with that even and unprejudiced state of mind, which is indispensable to the formation of correct and sober judgment. While true it is, that "imputation and strong circumstances . . . . lead directly to the door of truth," it must also be borne in mind, that

> "Trifles, light as air,
> Are, to the jealous, confirmation strong
> As proofs of holy writ."

To penetrate the mind of man, is totally out of human power; and

circumstances which apparently present powerful motives, may never have operated as such. Who can say, that some "uncleanly apprehensions,"—some transient thoughts of sinister aspect,—in the dimness of moral light momentarily mistaken for good, may not unbidden float across the purest mind? And how often is it that man has no control over circumstances of apparent omnipotence over his motives! But notwithstanding these qualifying considerations, it is proper that in investigations grounded upon circumstantial evidence, no fact should be overlooked; since it is impossible to predicate what may be its ultimate relevancy or effect when combined with other facts.

[*40] It must not be expected, that motives shall be discovered, which, tried by the strict rules of morality, will *be regarded as adequate. It is of the essence of moral weakness, that it forms a mistaken estimate of present advantage; and a want of correspondence and proportion will therefore of necessity be found between the objects of desire and the means employed to obtain them. The assassin's dagger may be put in requisition for a few pieces of gold; and the difference between that and other inducements to crime, is a difference only of degree.

But the moral anatomist has to encounter other difficulties, in endeavouring to trace the connection between actions and their impelling motives. Few men will voluntarily expose themselves to the reprobation of their fellow men by avowed contempt of the obligations of truth and duty. The desire of the approbation of others has a powerful and often an auspicious influence upon the character; but its operation is unfavourable, and even dangerous, whenever it becomes the leading motive of conduct.* Hence the human mind is subject to the influence of antagonist principles, and men frequently put on the semblance of characteristics of which they are entirely destitute; the natural inclination to truth being destroyed by overpowering inducements to dissimulation.

It follows from the preceding remarks, that evidence of collateral facts which appear to present a motive for a particular act of criminality, deserve in themselves no great weight; and perhaps they are, in general, important, only as they operate to counterpoise the antecedent improbability, that the party would have committed the act in question. It must ever be remembered, that with motives merely, the legislator and the magistrate have nothing to do; and that AC-

* Stewart's Philosophy of the Active and Moral Powers of Man, vol. i, ch. 7. sect. 1. Bentham's Jud. Ev. vol. i. bk. 1. ch. 6.

TIONS and EXTERNAL FACTS AS THE ENDS OR OBJECTS OF MOTIVES, are the only legitimately cognizable subjects of human tribunals. *Actus non facit *reum nisi mens sit rea*, is a [*41] rule of reason and justice not less than of positive law.*

Motives and their objects differ, it has been remarked, as the spring and wheels of a watch differ from the pointing of the hour, being mutually related in like manner.† But when the moral spring is once put in motion, then, even a gesture or a look may be the source of encouragement and impulse to the deadliest crimes, and subject the moral actor even to the highest legal penalty.

On the other hand, as an action without a motive would be an effect without a cause, and as the particulars of external situation and conduct will in general correctly denote the motive for a criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence.

It occasionally happens, that an action may be equally well accounted for by different motives of various degrees of malignity. Thus in the case of death occasioned by poison, it may have been administered with intention to kill, or with the intention of producing some other specific but less dangerous consequence.‡ A wound may have been malignantly inflicted, either with the intention of killing, or of doing some injury short of death. Possession of the fruits of crime may afford a presumption that the party with whom they are found, is the thief, or that he has received them with a guilty knowledge of the theft, or even that he has committed some more aggravated crime. One of several companions in guilt may have proceeded to an extremity, not originally contemplated even by himself and not concurred in by the others, as in the case of murder *committed to prevent resistance or discovery. [*42] In these and similar cases, it is impossible perhaps to assign with certainty the specific motive which led to the act, and it can be judged of only by the attendant circumstances; but social security and substantial justice require that every man shall be held accountable for the natural and probable consequences of his actions,§ and no one can be permitted to speculate with impunity upon the precise extent to which he can securely carry his mischievous inten-

* 3 Inst. 107.

† Hampden's Lectures, *ut supra*, p. 214.

‡ See the case of an Armenian lady, Memoirs of Sir James Mackintosh, ii. 112.

§ Rex *v.* Farrington, R, and R. p. 207. Rex *v.* Harvey, 2 B, and C. 257.

tions, or to allege the agency of less guilty motives and wishes, the reality and degree of which it is alike impossible to ascertain. It is a sound legal maxim, that in *criminalibus sufficit generalis malitia intentionis, cum facto paris gradus.** "All crimes," says Bacon, "have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which, though it be not the fact, at the which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue, of as high a nature. Therefore, if an impoisoned apple be laid in a place to impoison J. S., and J. D. cometh by chance and eateth of it, this is murder in the principal that is *actor*, and yet the malice *in individuo*, was not against J. D.†" But the operation of this rule has been carried beyond all reasonable limits, as in the case of Arundel Coke and John Woodburne, tried at the Suffolk spring assizes, 1722, for lying in wait, and slitting the nose of Mr. Crisp, the brother-in-law of Coke (an offence made capital by the stat. 22 and 23 Car. II. c. 1.;) it was ineffectually urged that the intention was to murder, in order to obtain an estate, and not to maim or disfigure; a defence which, had it been successful, would have reduced the crime to a misdemeanor.‡ The motive alleged was of
[*43] a *more aggravated kind than that which constituted the technical offence; but the act itself, legally speaking, was certainly not of the same degree as the crime of murder. "In capital cases," declares the same high authority, "*in favorum vitæ* the law will not punish in so high a degree, except the malice of the will and intention appear";§ and this case seems inconsistent alike with the general principles of criminal jurisprudence and with other decided cases.‖

Courts of justice, of necessity, interpret by external indications, the secret workings of the mind; but as such conclusions must in general be inferential merely, they can never be properly made the subject of testimonial opinion.¶ Whenever motives are suggested as arising out of external circumstances, it is required that such circumstances shall be distinctly proved. Except in questions of sci-

* Bacon's Maxims, Reg. xv.

† Ibid.

‡ 16 St. Tr. 54.

§ Bacon's Maxims, Reg. vii.

§ Campbell's Lives of the Lord Chancellors, iv. 601. Rex *v.* Bell, Foster's Crown L. App. Rex *v.* Carroll, 2 East's P. C. 400. Rex *v.* Duffin, R. and R. p. 365.

¶ A serious violation of this rule occurred in the case of Mary Blandy, tried in 1752, for the murder of her father, when a physician was allowed to state his opinion, that the agitation which the prisoner had evinced, proceeded from no concern for her parent, but from the apprehension of consequences to herself. (18 St. Tr. 1117.)

ence, witnesses are permitted to depose only to facts; it is the province of the jury alone, to determine as well whether those facts lead to *any* inference as to actuating motives, as also the particular character of any such conclusion.

In general, when an unlawful act has been voluntarily committed, the motive and intention, though essential elements of criminality, are rightly matters of legal inference and presumption *animus ex qualitate facti præsumitur.** In the vast majority of cases, the nature of the action is *per se* unequivocally indicative of guilty intention, and is *not susceptible of two interpretations; *res ipsa in se dolum habet* is the language of the old juridical wri- [*44] ters. When the act is of such a nature as not necessarily to imply a guilty intention, and the knowledge of the party of the nature of his conduct is the specific point at issue, then the evidence of collateral circumstances is of the highest importance, as explanatory of his intentions, and may be of vital moment. Thus where, upon a charge of maliciously shooting, it was questionable whether the act proceeded from accident or design, proof was admitted that the prisoner had intentionally shot at the same person about a quarter of an hour before.† So, upon the trial of a man for the murder of a woman, by administering to her prussic acid in porter, evidence was admitted that the deceased had been taken ill several months before, after partaking of porter with the prisoner; Mr. Baron Parke said, that although this was no direct proof of an attempt to poison, the evidence was nevertheless admissible, because anything tending to show antipathy in the party accused against the deceased was admissible‡. In like manner upon a charge of uttering forged notes, the forged notes of a different bank found on the prisoner's person, were allowed to be given in evidence to show guilty knowledge;§ and upon an indictment for uttering a forged Bank of England note, evidence was admitted that other notes of the same fabrication had been found on the files of the Bank with the prisoner's handwriting on the back of them.‖ In short, all such relevant acts of the party as may reasonably be considered explanatory of his motives, are clearly admissible in evidence.

* Mascardus de Prob. vol. i. Concl. xcv.

† Rex *v.* Voke, R. and R. p. 653.

‡ Reg. *v.* Tawell, *post.*

§ Rex *v.* Sunderland, 1 Lewin, 102. Rex *v.* Hodgson, ib. p. 103. Rex *v.* Kirkwood, ib. p. 103. Rex *v.* Martin, ib. p. 104. Rex *v.* Hull. Rex *v.* Millward, R. and R. p. 245.

‖ Rex *v.* Ball, 1 Campb. 324, R. and R. p. 132.

[*45] *It occasionally happens that actions of great enormity are committed, for which it is impossible to discover any motive. In such cases, which are not of frequent occurrence, upon principles of reason and justice essential to common security, the actor is held to be legally accountable, unless it be clearly and indubitably shown, that he is incapable of distinguishing the moral qualities and tendencies of his actions.

SECTION 2.

DECLARATIONS OF INTENTION.

It is not uncommon with persons about to engage in crime, to utter menaces, or to make obscure and mysterious allusion, to purposes and intentions of revenge, or to boast to others, whose standard of moral conduct is the same as their own, of what they will do, or to give vent to expressions of revengeful purposes, or of malignant satisfaction at the anticipated occurrence of some serious mischief. Such declarations or allusions are of great moment, when clearly connected by independent evidence with some subsequent criminal action. The just effect of such language is to show the existence of the *disposition*, from which criminal actions proceed, to render it less improbable that a person proved to have used it would commit the offence charged, and to explain the real motive and character of the action. But proof of such language cannot be considered to dispense with the obligation of strict proof of the criminal facts; for, though malignant feelings may possess the mind, and lead to intemperate and even criminal expressions, they nevertheless may exercise but a transient influence, without leading to action*.

[*46]

*SECTION 3.

PREPARATIONS FOR THE COMMISSION OF CRIME.

Premeditated crime must necessarily be preceded not only by impelling motives, but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion —as of poison, coining instruments, combustible matters, picklock keys, dark-lanthorns, or other destructive or criminal weapons, in-

* Bentham's Jud. Ev. vol. iii. bk. 5. ch. 4.

struments, or materials, and many other acts of apparent preparation for crime—are important facts in the judicial investigation of imputed crime. Where a man had in his possession a large quantity of counterfeit coin unaccounted for, and there was no evidence that he was the maker, it was held to raise a presumption that he had procured it with intent to utter it*. But the personal character for probity, and the civil station of the party, are highly material in connexion with facts of this kind. A medical man, for instance, in the ordinary course of his profession has legitimate occasion for the possession of poisons, a locksmith for the use of picklock keys.

Facts of the kind referred to become more powerful indications of guilty purpose, if false reasons are assigned to account for them; as, for instance, in the case of possessing poison, that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases.

The bare possession of the means of crime, or other mere acts of preparation, without more conclusive evidence, are not in themselves of great weight, because, as in the case of the presumed existence of motives, the intended guilt may not have been consummated; and until that takes place there is the *locus penitentiæ*. But as preparations must necessarily precede the commission of premeditated *crime, some traces of them may generally be ex- [*47]
pected to be discovered; and if there be not clear and decisive proof of guilt, the absence of any evidence of such preliminary measures is a circumstance strongly presumptive of innocence.

In the foregoing remarks it is, of course, assumed, that the party possessed the *opportunity* of committing the imputed act, without which, neither the existence of motives, nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight.

SECTION 4.

RECENT POSSESSION OF THE FRUITS OF CRIME.

Since the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows, that the possession of the fruits of crime, recently after it has been committed affords a strong and reasonable ground for the presumption, that the party in whose possession they were found, was the real offender, unless he can account

* Rex *v.* Fuller, R. and R. p. 308.

for such possession, in some way consistently with his innocence.* The force of this presumption has been recognized from the earliest times ;† its foundation is the obvious consideration, that if the possession has been lawfully acquired, the party would be able, at least, shortly after its acquisition, to give an account of the manner in which such possession was obtained, and his unwillingness or inability to afford such explanation is justly regarded as amounting [*48] *to strong self-condemnatory evidence. If the party give a reasonable and probable account of the way in which he became possessed of the property, as by stating the name of the person from whom he obtained it, and such party is known to be a real person, it is then incumbent on the prosecutor to show that such account is false ; but, if the account given be unreasonable or improbable on the face of it, then the accused must prove its truth, or otherwise he will not be relieved from the pressure of the general rule of presumption. Therefore, where a man was indicted for stealing a piece of wood, which was found five days after the theft in his shop, and he stated that he had bought it from a person whom he named, and who lived about two miles off, it was held that the prosecutor was bound to show that the account was false.‡

It is manifest that the force of this rule of presumption depends upon the recency of the possession as related to the crime, and upon the exclusiveness of such possession.

1. If the interval of time between the loss and the finding be considerable, the presumption as it affects the party in possession of the stolen property is much weakened,§ and the more especially so if the goods are of such a nature as in the ordinary course of things frequently to change hands. From the nature of the case it is not possible to fix any precise period within which the effect of this rule of presumption can be limited ; it must depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Where two pieces of woolen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after being missed, and still in the same state, it was held [*49] that this was a possession sufficiently recent to call *upon

* Rex *v.* Burdett, 4 B. and Ald. 149. Anon. 2 C. and P. 459. Burnett on the C. L. of Scotl. p. 555. Mascardus De Prob. vol. ii. Concl. DCCCXXXIV. Hume's Comm. on the C. L. of Scotl. i, 111. 3 Starkie's L. of Ev. 933. Best on Pres. p. 44.

† Gen. xliv. 5.

‡ Reg. *v.* Smith, 2 C. and K. 207.

§ Rex *v.* Cockin, 2 Lewin, 235.

him to show how he came by the property.* In another case Mr. Justice Bayley directed an acquittal, because the only evidence against the prisoner was that the goods were not found in his possession until after a lapse of sixteen months after the loss.† And where a shovel which had been stolen was found six months after the theft in the house of the prisoner, who was not then at home, Mr. Baron Gurney held that on this evidence alone the prisoner ought not to be called upon for his defence.‡ Where the only evidence against a prisoner, charged with the larceny of a saw and mattock, was that the stolen articles were found in his possession three months after they were missed, it was held that this was not such a recent possession as *per se* to put him upon showing how he came by them ;§ but where the evidence against the prisoner was, that three sheets were found upon his bed in his house three months after they had been stolen, Mr. Justice Wightman held that the case must go to the jury, on the ground that it was impossible to lay down any rule as to the precise time which was too great to call upon the prisoner to account for the possession.‖ And where seventy sheep were put upon a common on the 18th of June, but not missed until November, and the prisoner was proved to have had possession of four of them in October and of nineteen more on the 23rd of November, the judge allowed evidence of the possession of both to be given.¶

2. It is obviously essential to the just application of this rule of presumption, that the house or other place in which the stolen property is found be in the *exclusive* *possession of [*50] the prisoner. Where it is found in the apartments of a lodger, for instance, the presumption may be stronger or weaker, according as the evidence does or does not show an exclusive possession. The possession of the wife has been held, under the circumstances, to be the possession of the husband. A constable went with a warrant to search the prisoner's premises for stolen iron, and almost immediately after the prisoner was taken away from the premises at the conclusion of the search, his wife carried some tin under her cloak from a warehouse on the premises. Mr. Justice Coleridge on the trial of the prisoner for receiving stolen brass and tin, held

* Rex *v.* Partridge, 7 C. and P. 551.

† Anon. 7 Monthly Law Mag. 58.

‡ Rex *v.* Cruttenden, Best on Pres. p. 306. 6 Jurist, 267.

§ Rex *v.* Adams, 3 C. and P. 600,

‖ Rex *v.* Dewlett, 2 Russell on Crimes, by Greaves, 728.

*¶ Rex *v.* Dewhirst, 2 Stark. 614.

that it was for the jury to consider whether her possession was not the prisoner's, she being upon the premises and all the circumstances being taken into consideration, and that it was not like the case where the wife is in possession of stolen property at a distance from the premises of her husband.* And upon an indictment against principal and receiver, where goods were found on the receiver's premises, which had been taken from the prosecutor's premises, it was held to be competent to the prosecutor to give evidence of the finding of other goods at the house of the principal, notwithstanding there was no evidence to connect the receiver with them.†

The force of this presumption is greatly increased if the fruits of a plurality or of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a multiplicity of miscellaneous articles, or be of an uncommon kind, or from its value or other circumstances be inconsistent with or unsuited to the station of the party.

On the trial of two men at Aberdeen autumn circuit, 1824, it appeared that a carpenter's workshop at Aberdeen was
[*51] broken open on a particular night, and some tools carried off, and that on the same night the counting-houses of Messrs. Davidson and of Messrs. Catto and Co., in different parts of that city, were broken into, and goods and money to a considerable extent stolen. The prisoners were met at seven on the following morning in one of the streets of Aberdeen, at a distance from either of the places of depredation, by two of the police. Upon seeing the officers they began to run; and being pursued and taken, there was found in the possession of each a considerable quantity of the articles taken from Catto and Co., but none of the things taken from the carpenter's shop or Davidson's. But in Catto and Co.'s warehouse were found a brown coat and other articles got from Davidson's, and which had not been there the preceding evening when the shop was locked up; and in Davidson's were found the tools which had been abstracted from the carpenter's. Thus, the recent possession of the articles stolen from Catto and Co.'s proved that the prisoners were the depredators in that warehouse; while the fact of the articles taken from Davidson's having been left there, connected them with that prior housebreaking; while, again, the chisels belonging to the

* Reg. *v.* Mansfield, 1 Carr. and Melsh. 142.

† Reg. *v.* Hinley, York Winter Ass. 1843. 2 Law Times, 287.

carpenter's shop, found in Davidson's, identified the persons who broke into that last house with those who committed the original theft at the carpenter's. The prisoners were convicted of all the thefts.*

A still stronger case of the same kind occurred at Aberdeen in April, 1826, on the trial of a man, who was accused of no fewer than nine different acts of theft by housebreaking, committed in and around Aberdeen at various times during the summer of 1825 and the following winter. No suspicion had been awakened against the prisoner, who was a carter, living an industrious and apparently regular life, until one occasion, when some of the stolen articles having been detected in a broker's shop, and traced to his [*52] custody, a search was made, and some articles from all the houses broken open found amongst an immense mass of other goods, evidently stolen, in a large chest, and concealed about various parts of the prisoner's house. Their number and variety, and the place where they were found were quite sufficient to convict him of receiving the stolen property; but as they were discovered at the distance of many months from the times when the various thefts had been committed, the difficulty was how to connect him with the actual theft. The charges selected for trial were five in number, and as nearly connected with each other in point of time as possible. In none of them was the prisoner identified as the person who had broken into the houses, although the thief had been seen, and more than once fired at; but in all the first four houses which had been broken into were discovered some of the articles taken from the others, and in the prisoner's custody were found some articles taken from them all, which sufficiently proved that all the depradations had been committed by one person; and the mark of an iron instrument was found on *three* of the windows broken, which coincided exactly with a chisel left in the *last* house. Two days after the housebreaking of that house, an old watch, part of the stolen property, was shown by the prisoner to a shopkeeper, to whom it was soon afterwards sold, and by him delivered up to the officers. Upon this evidence the prisoner was convicted of all the charges of housebreaking.†

The possession of stolen goods *recently* after their loss, may be indicative not of the offence of larceny simply, but of any more ag-

* Rex *v.* Downie and Milne, Allison's Princ. p. 313; Mascardus, De Probat. vol. i. Concl. DC CCXXXI.

† Rex *v.* Bowman, Allison's Princ. p. 314.

gravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt was soon afterwards found in the [*53] possession of the *prisoner, was held to raise a probable presumption that he was present and concerned in the offence*.

So this particular fact of presumption is of the highest importance in cases of murder, where that circumstance forms, as it most commonly does, an element of evidence†. This special application of the rule in question was very emphatically laid down by Mr. Justice Bayley on the trial of John Diggles at Lancaster spring assizes, 1826, for the murder of two aged persons, Benjamin Cass and his wife, who added that the presumption of guilt becomes much stronger, if the party, in endeavouring to account for his possession of the property, gives a false statement. The deceased were last seen alive about ten in the evening of the 1st of October 1825, and were found murdered about six o'clock on the following morning. The prisoner was acquainted with the deceased, and had been seen in the vicinity of their cottage between four and five o'clock in the afternoon of the day on which they were murdered, and he was also seen on the following morning at ten o'clock at some distance proceeding in a direction from the spot. On the evening of Sunday the 2nd of October, and on the following day, the prisoner sold several articles of wearing apparel, proved to have belonged to the old man, to persons to whom he gave false accounts as to the place from whence he had come. Upon his apprehension a few days afterwards, the prisoner stated that he had bought the articles in question on the Sunday. In the waistcoat pocket the person who purchased it from the prisoner found a pair of spectacles, which were proved to have belonged to Cass; as to which the learned Judge observed, that "it was not very likely that the old man should have sold them, [*54] and that such articles become, as *it were part of a man's person." The prisoner was convicted, and before his execution confessed his guilt.

Upon the principle of this presumption a sudden and otherwise inexplicable transition from a state of indigence, and a consequent change of habits, is sometimes a circumstance extremely unfavourable to the supposition of innocence‡.

* Rex v. Rickman, ii. East's P. C. 1035; and see Fuller's case, R. and R. p. 308.

† Rex v. Burdett, iv. B. and Ald. 122. Reg v. Courvoisier, *post*.

‡ Rex v. Burdock, *post*.

But this rule of presumption must be applied with caution and discrimination, for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt. Sir Matthew Hale lays it down, that "if a horse be stolen from A, and the same day B be found upon him, it is a strong presumption that B stole him; yet," adds that excellent lawyer, "I do remember before a learned and very wary judge, in such an instance, B was condemned and executed at Oxford assizes, and yet within two assizes after, C, being apprehended for another robbery, and convicted, upon his judgment and execution confessed he was the man that stole the horse, and being closely pursued desired B, a stranger, to walk his horse for him while he turned aside upon a necessary occasion and escaped; and, B was apprehended with the horse and died innocently*." A very similar case occurred at the Surrey summer assizes, 1827, where a young man was convicted of stealing two oxen. The prisoner, having finished his apprenticeship to a butcher at Monk Wearmouth, went to visit an uncle at Portsmouth, from whence he set out to return to London. On the road from Guildford to London, about three o'clock in the morning, he overtook a man riding upon a pony and driving two oxen; who finding that he was going to London, offered him five shillings to drive them for him to London, which he agreed to do, the man engaging to meet him at Westminster Bridge. At Wandsworth the prisoner *was appre- [*55]
hended by the prosecutor's son, and charged with stealing the oxen. On his apprehension he assumed a false name, under which he was tried, to conceal his situation from his friends. The prisoner was convicted, but on a representation of the circumstances he received a pardon, when on the point of being transported for life†: he had been the dupe of the real thief, who, finding himself pursued, had thus contrived to rid himself of the possession of the cattle.

The recent possession of stolen property may sometimes be referrible not to the crime of theft, but to that of having received it with a guilty knowledge of its having been stolen. Four persons were found guilty of housebreaking on proof of the recent possession of the goods; but it was afterwards ascertained that one of them, who had long been known as a receiver of stolen goods, knew nothing of

* ii. Hale's P. C. ch. 39.

† Rex v. Gill, Sessions Papers and A. R. 1827.

the robbery until after it had been committed, and had purchased the goods from the real thieves the day after the robbery. He very narrowly escaped execution*. There must always be some chance of such mistake, especially if the goods are traced *ex intervallo;* but persons who thus connect themselves with crime have little title to sympathy, when they incur no greater amount of punishment than the law attaches to their actual offence; and it has been suggested, as an amendment of the law, that counts for receiving should be allowed to be joined with counts for larceny†.

The rule under discussion is occasionally attended with uncertainty in its application, from the difficulty attendant upon the positive identification of articles of property alleged to have been stolen; and it clearly ought never to be applied, where there is reasonable ground to conclude *that the witnesses may be mistaken, or where
[*56] from any other cause identity is not satisfactorily established.

But the rule is nevertheless fairly and properly applied in peculiar circumstances, where, though positive identification is impossible, the possession of the property cannot without violence to every reasonable hypothesis but be considered of a guilty character; as in the case of persons employed in carrying sugar and other articles from ships and wharfs. Cases have frequently occurred of convictions of larceny, in such circumstances, upon evidence that the parties were detected with property of the same kind upon them recently after coming from such places, although the identity of the property as belonging to any particular person could no otherwise be proved.‡ On this principle two men were convicted of larceny upon evidence that the prosecutor's soap manufactory, near Glasgow, had been broken into in the night and robbed of about 120 lbs. of yellow soap, and that the prisoners were met on the same night, about eleven o'clock, by the watchman near the center of the city, from whom they attempted to escape, one bearing on his back 40 lbs. of soap of the same size, shape and make as that stolen from the prosecutor's premises, and the other with his clothes soiled over with the same substance, though the property could not be more distinctly identified.§ It is seldom however that juries are required to determine upon the effect of evidence of the mere recent possession of

* Rex *v.* Ellis, Sessions Papers and A. R. 1831.

† Best on Pres. p. 304.

‡ ii. East's P. C. 1035.

§ Rex *v.* McKechnie and Tolmie, Allison's Princ. p. 322.

stolen property; from the very nature of the case, the fact is generally accompanied by other corroborative or explanatory circumstances of presumption. If the party have secreted the property,—if he deny that it is in his possession, and such denial is discovered to be false,—if he cannot show how he became possessed of it,—if he give false, incredible, or inconsistent accounts *of the manner in which he acquired it, as that he had found it, or [*57] that it had been given or sold to him by a stranger or left at his house,—if he has disposed of or attempted to dispose of it, at an unreasonably low price,—if he has absconded or endeavored to escape from justice,—if other stolen property, or picklock keys, or other instruments of crime be found in his possession,—if he were seen near the spot at or about the time when the act was committed,—or if any article belonging to him be found at the place or in the locality where the theft was committed, at or about the time of the commission of the offence,—if the impressions of his shoes or other articles of apparel correspond with marks left by the thieves,—if he has attempted to obliterate from the articles in question marks of identity, or to tamper with the parties or the officers of justice,—these and all like circumstances are justly considered as throwing light upon and explaining the fact of possession, and render it morally certain that such possession can be referrible only to a criminal origin, and cannot otherwise be rationally accounted for.

SECTION 5.

UNEXPLAINED APPEARANCES OF SUSPICION, AND ATTEMPTS TO ACCOUNT FOR THEM BY FALSE REPRESENTATIONS.

As a general rule, to which the exceptions can be but rare, it is a reasonable conclusion, that an innocent party can explain suspicions or unusual appearances, connected with his person, dress, or conduct; and that the desire of self-preservation, if not a regard for truth, will prompt him to do so. The ingenuous and satisfactory explanation of circumstances of apparent suspicion, always operates powerfully in favor of the accused, and obtains for him more ready credence when the explanation may not be so easily *verified. On the other hand, the force of suspicious circum- [*58] stances is augmented, whenever the party attempts no ex-

planation of facts which he may reasonably be presumed to be able and interested to explain.

An old man on his way home from Halifax market, where he had staid late, was attacked, thrown down and robbed by three men, one of whom he wounded in the struggle with a clasp knife. Upon the apprehension of one of the robbers at the house of his mother, he was dressed in a new pair of trowsers, and the constable found in a room upstairs, between the bed and the mattress, a pair of trowsers with two long cuts in one thigh, one of which had penetrated through the lining, and was stained with blood at that spot; and the holes had been sewed with thread which was not discoloured, showing that the blood must have been applied to the cloth previous to the repair, and a corresponding cut bound over with plaisters was found on the prisoner's thigh. The prisoner refused to give any explanation of the wound or of the cuts in the garments, and he was convicted and transported*.

But circumstances of suspicion merely, without more conclusive evidence, are not sufficient to justify conviction. Two women were indicted for colouring a shilling and a sixpence, and a man as counselling them; and the evidence against him was that he visited the women once or twice a week, that the rattling of copper money was heard while he was with them, that once he was counting something just after he came out, that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape, and that there were then found upon him a bad three-shilling-piece and five bad sixpences; upon a case reserved, the judges thought the evidence too slight to convict him†.

[*59] *False or contradictory statements, for the purpose of accounting for suspicious circumstances connected with the person, dress, or conduct, when clearly disproved, become facts of a still more criminatory effect; and the allegations urged as reasons tending to defence and exculpation are not neutralized merely, but become formidable inculpatory facts‡.

On a late trial for the murder of a female by poison, but whom the prisoner alleged to have died from the effects of a draught wilfully taken by her in anger during an altercation between them, Mr. Baron Parke told the jury that it was for them to say whether the falsehoods the prisoner had told did not show that he was conscious

* Rex *v.* Dawtrey, York Sp. Assizes, 1841.

† Rex *v.* Isaacs, ii. Russell, by Greaves, 729.

‡ See Rex *v.* Richardson, *post.*

that he had been guilty of some act that required concealment; that it was very true he might not wish it to be known he had been visiting a woman who, there was good reason to believe, had formerly been his mistress; but that, if he was an innocent man, and had been present at the death, one would have supposed he would have disclosed it immediately and called in some assistance. They had here two untruths, that he meant to dine at the west end of the town and did not; and his denial that he had been out of London that evening; these, he said, were very material matters for their inquiry, bearing in mind that upon the evidence there was a very ample case for grave consideration, to show that the deceased died of prussic acid, and that the prisoner was present in the house at the moment of that death. His Lordship added, that if the prisoner's representation had been true, that the deceased had poisoned herself, one would have supposed that he would have taken the first opportunity, having been present at the time this occurred, of exonerating himself from it, by making this declaration to the first person he met; one would expect, if he had been a man of the least cordial feeling, he would have *waited to see whether it was true or not that she had taken this poison and called for assistance, instead of which, he is proved to have gone in a short time to London, and when he got to London he is proved to have denied altogether that he had been there. You must judge, said the learned Baron, of the truth of the case against a person by all his conduct taken together*. [*60]

Allowance must nevertheless be made for the weakness of human nature, and for the difficulties which may attend the proof of circumstances of exculpation; and care must be taken that circumstances are not erroneously assumed to be suspicious without sufficient reason†.

SECTION 6.

INDIRECT CONFESSIONAL EVIDENCE.

Although the subject of direct confession does not fall within the province of this essay, it is necessary to advert to some of the prin-

* Reg. *v.* Tawell, Aylesbury Sp. Assizes, 1845.

† See Rex *v.* Looker, and Rex *v.* Thornton, *post.*

cipal rules, which relate to that important head of moral evidence; because they are of great moment in their application to such heads of circumstantial evidence as are only *indirectly* in the nature of confessional evidence.

A voluntary confession of guilt, if it be full, consistent, and probable, is justly regarded as evidence of the highest and most satisfactory nature*. Self-love, the mainspring of human conduct, will usually prevent a rational being from making admissions prejudicial to his interest and safety, unless when caused by the promptings of truth and conscience.

[*61] By the law of England, a voluntary and unsuspected confession *is clearly sufficient to warrant conviction, wherever there is independent proof of the *corpus delicti*. According to some authorities, confession alone is a sufficient ground for conviction, even in the absence of any such independent evidence†; but the contrary opinion is most in accordance with the general principles of reason, justice, and humanity, the opinions of the best writers on criminal jurisprudence, and the practice of other enlightened nations‡. Nor are the cases adduced in support of the doctrine in question very decisive, since in all of them there appears to have been some evidence, though slight, of confirmatory circumstances, independently of the confession§.

Judicial history presents innumerable warnings of the danger of placing implicit dependence upon this kind of self-condemnatory evidence, even where it is exempt from all suspicion of coercion, physical or moral, or other sinister influence. How greatly then must such danger be aggravated, where confession constitutes the only evidence of the fact of a *corpus delicti;* and how incalculably greater in such cases is the necessity for the most rigorous scrutiny of all collateral circumstances, which may actuate the party to make a false confession! The agonies of torture, the dread of their infliction, the hope of escaping the rigours of slavery or the hardships of military service, a weariness of existence, self-delusion, the desire to shield a guilty relative or friend from the penalties

* Mascardus De Prob. vol. iii. concl. 15, 16. Rex *v.* Warrickshall, Leach's C. C. i. 299. Greenleaf, L. of Ev. vol. i. sec. 219.

† Best on Pres. p. 330, and the cases cited.

‡ Greenleaf's L. of Ev. i. sec. 217. Allison's Princ., p. 325. Code Pénal d'Autriche, Part i. sec. ii. ch. x. Gabriel, *ut supra*, p. 226.

§ Rex *v.* Fisher, i. Leach, 286. Rex *v.* Eldridge, R. and R. p. 441. Rex *v.* Faulkner, *ib.* p. 481. Rex *v.* White, *ib.* p. 508. Rex *v.* Tippett, *ib.* p. 509. Greenleaf's L. of Ev. vol. i. sec. 217.

of justice*, the impulses of despair from the *pressure of [*62]
strong and apparently incontrovertible presumptions of
guilt, the dread of unmerited punishment and disgrace, and the
hope of pardon—these and numerous other inducements not unfre-
quently operate to produce unfounded confessions of guilt.

Ulpian relates the case of a slave, who falsely accused himself of a murder, in order that he might not return under the dominion of a cruel master.

Innumerable are the instances on record of confession, extracted "by the deceitful and dangerous experiment of the criminal question"†, of offences which were never committed, or not committed by the persons making confession‡. Nor have such instances been wanting even in the present century.

When Felton, upon his examination at the Council Board, declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham, the Bishop of London said to him, "If you will not confess, you must go to the rack." The man replied, "If it must be so, I know not whom I may accuse in the extremity of the torture,—Bishop Laud perhaps, or any lord at this Board§." "Sound sense," observed the excellent Sir Michael Foster, "in the mouth of an enthusiast and a ruffian‖."

Not less repugnant to policy, justice, and humanity is the moral torture to which in some (perhaps in most) of the nations of Europe, persons suspected of crime are subjected, by means of searching, rigorous and insidious examinations, conducted by
skilful adepts in judicial tactics, *and accompanied some- [*63]
times even by dramatic circumstances of terror and intimidation¶.

Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. "Though," says he, "the Lord Chief-Justice told the King that 'all his discourse was so disjointed he did not

* i. Chitty's Crim. L. 85

† Gibbon's Decline and Fall, vol. iii. ch. xvii.

‡ Jardine on the Use of Torture in the C. L. of England, pp. 3, 6 ; and see Fortescue D. Laudibus Legum Angliæ, ch. xxii.

§ Rushworth's Collections, i. 638.

‖ Foster's C. L. p. 244. (third ed.)

¶ See the case of Riembaur, a Bavarian priest, charged with murder, in Narratives of Remarkable Criminal Trials, by Feuerbach, *ut supra*.

believe him guilty,' yet upon his own confession the jury found him guilty, and he was executed accordingly:" the historian adds, "though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only upon his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life and chose to part with it this way*."

A very remarkable case of this nature was that of the two Boorns, convicted in the Supreme Court of Vermont, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them, and that one of them struck him a violent blow on the back of the head, with a club, which felled him to the ground. Some suspicions arose, at that time, that he was murdered; which were increased by the finding of his hat, in the same [*64] field, a few months afterwards. These suspicions in *process of time subsided; but in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstances, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes were found in an old open cellar in the same field; and in a hollow stump not many rods from it, were discovered two nails and a number of bones believed to be those of a man. Upon this evidence, together with the deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death, to that of perpetual imprisonment; which as to one only of them was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that the prisoners would kill him. The bones were those of an animal. The

* Life and Continuation, &c., iii. 94. (Clarendon, ed. 1824.)

prisoners had been advised by some misjudging friends, that, as they would certainly be convicted, upon the circumstances proved, their only chance for life was by a commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy*.

The State Trials contain numerous confessions of witchcraft, and abound with absurd and incredible details of communications with evil spirits, which only show that the parties were impostors, or the involuntary victims of invincible self-delusion.

A distinguished foreign lawyer well observes, that "whilst such anomalous cases ought to render courts *and [*65] juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the Court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic, and should be regarded as offensive to the intelligence both of the Court and jury†."

It is essential to justice, that a confessional statement, if it be consistent and probable, should be taken together, and not distorted, or but partially adopted‡. On the trial of a man for a murder committed twenty-four years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended, and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole; and that so qualified, it did not in fairness amount to an admission of the guilt of murder.§ And where the prisoner's declaration, in which she asserted her innocence, was given in evidence against her, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration; but where there is, in the whole case, no evidence but what is compatible with

* 1 Greenleaf's L. of Ev. § 214.

† 1 Hoffman's Course of Legal Study, 367.

‡ Gabriel, *ut supra*, 230.

§ Rex *v.* Clewes, 4 C. and P. 221.

the assertion of innocence, given in evidence for the prosecution, the judge will direct an acquittal*.

[*66] *If a confessional statement be inconsistent, incredible, or improbable, or be contradicted or discredited by other evidence, or be the emanation of a weak, or heated, or excited state of mind, the jury may exercise their discretion in rejecting it, either wholly or in part, whether the rejected part make for or against the prisoner†.

On the trial of a man for feloniously setting fire to a stack of hay, it appeared that between two and three o'clock in the morning, a police constable attracted by the cry of fire went to the spot, close to which he met the prisoner, who told him that a haystack was on fire, and that he was going to London; the policeman asked him to give information of the fire to any policeman he might meet, and request him to come and assist. Shortly afterwards, on his way towards London, the prisoner met a serjeant of police whom he informed of the fire, stating that he was the man who set the stack on fire, upon which he was taken into custody. The serjeant of police, on cross examination by the prisoner, stated that the magistrates entertained an opinion that he was insane, and directed inquiries to be made, from which it appeared that he had before been charged with some offence and acquitted on the ground of insanity. When apprehended the prisoner appeared under great excitement; and upon his trial he alleged that he had been confined two years in a lunatic asylum, and had been liberated only about a year ago; that his mind had been wandering for some time; and that passing by the place at the time of the fire, he was induced, in a moment of delirium, to make this groundless charge against himself. He begged the Court to explain to the jury the different result that would follow from his being acquitted on the ground of insanity and an unconditional acquittal; and said that rather than the former

[*67] verdict should be returned, *which would probably have the effect of immuring him in a lunatic asylum for the rest of his life, he would retract his plea of not guilty, and plead guilty to the charge. Mr. Justice Williams in summing up remarked, that there did not appear to be the least evidence against the prisoner except his own statement; and that it was for the jury to say under all the circumstances, whether they believed that state-

* Rex *v.* Jones, 2 C. and P. 629.

† Rex *v.* Higgins, 3 C. and P. 603. Rex *v.* Steptoe, 4 C. and P. 397. 1 Greenleaf's L. of Ev. § 218.

ment was founded in fact, or whether it was, as the prisoner alleged, merely the effect of an excited imagination and weak mind. The prisoner was acquitted*.

It is obvious that every caution observed in the reception of evidence of a direct confession, ought to be more especially applied in the admission and estimation of the analogous evidence of statements which are only *indirectly* in the nature of confessional evidence; since such statements from the nature of the case must be ambiguous, or relate but obscurely to the *corpus delicti*.

"Hasty confessions," says Sir Michael Foster, "made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported,—whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction, and withal this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."†

Upon the trial of Richard Coleman at Kingston spring assizes, 1748-49, for the murder of a woman, who had been
*brutally assaulted by three men, and died from the injuries she received, it appeared that one of the offenders, at [*68]
the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered "Yes, what of that?" The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes I was, and what then?" or, as another account states, "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with the view of ensnaring him; but, doubtless much influenced by this imprudent and blameable language, the jury convicted him, and he was executed. The real offenders were discovered about two years afterwards, and two of them were executed for this very offence, and fully admitted

* Reg *v.* Wilson, Maidstone winter assize, 1844. The same doctrine was held by L. C. J. Wilde, in a case of arson at Maidstone spring assizes, 1847, where the prisoner to conceal his disgrace refused to give his name.

† Foster's C. L. 243; and see 1 Greenleaf's L. of Ev. § 214.

their guilt; the third having been admitted to give evidence for the Crown, and the innocence of Coleman was rendered indubitable.*

In the most debased persons there is an involuntary tendency to truth and consistency, except when the mind is on its guard, and studiously bent upon concealment. This law of our nature sometimes gives rise to evidentiary facts of great weight, and may be traced in minute and unpremeditated acts. In the case of Eugene Aram, who was tried in the year 1759 for the murder of Daniel Clark, an apparently slight circumstance in the conduct of Houseman, his accomplice, led to Aram's conviction and execution. About thirteen years after the time of Clark's being missing, a labourer, employed in digging for stone to supply a limekiln near
[*69] Knaresborough, discovered a human *skeleton near the edge of the cliff. It soon became suspected that the body was that of Clark, and the coroner held an inquest. Aram and Houseman were the persons who had last been seen with Clark, on the very night before he was missing. Houseman was summoned to attend the inquest, and discovered signs of uneasiness: at the request of the coroner he took up one of the bones, and in his confusion dropped this unguarded expression, "This is no more Daniel Clark's bone than it is mine;" from which it was concluded, that if he was so certain that the bones before him were not those of Clark, he could give some account of him. He was pressed with this observation, and, after various evasive accounts, he made a full confession of the crime; and upon search, pursuant to his statement, the skeleton of Clark was found in St. Robert's Cave, buried precisely as he had described it.†

A remarkable fact of the same kind occurred in the case of one of three men convicted, in February 1807, of the murder of Mr. Steele. In consequence of disclosures made by an accomplice, a police-officer apprehended the prisoner about four years after the murder on board the Shannon frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been about three years before; to which he answered that he was employed in London as a day-labourer. He then asked him where he had been employed that time four years: the man immediately turned pale, and would have fainted away had not water

* 1 Remarkable Trials, 162, 172. 4 Celebrated Trials, 344, Rex *v.* Jones and Welch.

† The genuine account of the life and trial of Eugene Aram, and Biographia Britannica, article EUGENE ARAM.

been administered to him. These marks of emotion derived their weight from the latency of the allusion—no express reference having been made to the offence with which the prisoner was charged—and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely *referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period.* [*70]

To this head may be referred the acts of concealment, disguise, flight, and many other *ex post facto* indications of mental emotion. By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods whether he were found guilty or acquitted ;† and the officer always, until the abolition of the practice by statute,‡ called upon the jury after verdict to state whether the party had fled on account of it.§ These several acts in all their modifications are indications of fear ; but it would be harsh and unreasonable invariably to interpret them as indications of moral consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs ; but it does not follow that, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt. Mr. Justice Abbott, on a trial for murder where evidence was given of flight, observed in his charge to the jury, that " a person, however conscious of innocence, might not have courage to stand a trial ; but might, although innocent, think it necessary to consult his safety by flight." " It may be," added the learned judge, " a conscious anticipation of punishment for guilt, as the guilty will always *anticipate the consequences ; but at the same time it may possibly be, according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this is."‖ It is not possible to lay down any express test by which these various indications may [*71]

* 6 Celebrated Trials, 19 ; and Sessions Papers, 1807.

† Co. Litt. 375. ‡ 7 and 8 Geo. IV. cap. § 5.

§ 1 Hale's P. C. ch. 27 and 2 *ibid.* ch. 12. 4 Bl. Comm. 387.

‖ Rex *v.* Donnall, *post.*

be infallibly referred to any more specific origin than the operation of fear. Whether that fear proceeds from the consciousness of guilt, or from the apprehension of undeserved disgrace and punishment, and from deficiency of moral courage, is a question which can be judged of only by reference to concomitant circumstances. Prejudice is often epidemic, and there have been periods and occasions when public indignation has been so much and so unjustly aroused as reasonably to deter the boldest mind from voluntary submission to the ordeal of a trial. The consciousness that appearances have been suspicious, even where suspicion has been unwarrantable, has sometimes led to acts of conduct apparently incompatible with innocence, and drawn down the unmerited infliction of the highest legal penalty.

The inconclusiveness of these circumstances is strikingly exemplified in the before-mentioned case of Coleman.* The magistrate was so fully convinced of the prisoner's innocence, that he allowed him to go at large on bail to appear at the assizes. The coroner's inquest having brought in a verdict of guilty against him, he endeavored to escape from the danger of a trial in the excited state of public feeling by flight; but was subsequently apprehended, and convicted, and executed on a charge of murder, of which he was unquestionably guiltless.†

[*72] In the endeavor to discover truth no evidence should be excluded; but that case must be scanty of evidence which demands that importance should be attached to circumstances so fallacious as the acts in question.

SECTION 7.

THE SUPPRESSION, DESTRUCTION, FABRICATION AND SIMULATION OF EVIDENCE.

It is a maxim of law that *omnia præsumuntur contra spoliatorem*, and the suppression or destruction of pertinent evidence is always therefore deemed a prejudicial circumstance of great weight; for as no action of a rational being is performed without a motive, it not-

* *Ante*, p. 68.

† See also the case of Green and others, 14 St. Tr. 1369, where several persons, one of whom had voluntarily surrendered, were convicted of a groundless charge of murder and piracy.

urally leads to the inference that such evidence, if it was produced, would operate unfavorably to the party in whose power it is.*

A chimney sweeper having found a jewel, took it to a jeweller to ascertain its value; who, having removed it from the socket, gave him three half-pence and refused to return it. The friends of the finder encouraged him to bring an action against the jeweller; and the Lord Chief Justice Pratt directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages.†

On an ejectment involving the title to large estates in Ireland, the question being whether the plaintiff was the legitimate son of Lord Altham, and therefore prior in right to the defendant, who was his brother, it was proved *that the defendant [*73] had procured the plaintiff, when a boy, to be kidnapped and sent to America, and, on his return, fifteen years afterwards, on occasion of an accidental homicide, had assisted in an unjust prosecution against him for murder: it was held that these circumstances created a violent presumption of the defendant's knowledge of title in the plaintiff; and the jury were directed that the suppressor and the destroyer were to be considered in the same light as the law considers a spoliator, as having destroyed the proper evidence; that against him, defective proof, so far as he had occasioned such defect, must be received, and everything presumed to make it effectual; and that if they thought the plaintiff had given probable evidence of his being the legitimate son of Lord Altham, the proof might be turned on the defendant, and they might expect satisfaction from him that his brother died without issue.‡

The foregoing illustrations of the rule of evidence under consideration, are among the most striking recorded cases of its application; nor are they the less pertinent because they arose in civil cases, since the rules of evidence are the same in all cases, whether civil or criminal.§

In the memorable case of Captain Donellan, the rinsing of the phials from which Sir Theodosius Boughton had taken the draught

* 1 Starkie's L. of Ev. 437.

† Armorie *v.* Delamire, 1 Strange, 555; and see Rex *v.* Lord Melville, 29 St. Tr. 1457, and Mortimer *v.* Craddock, 12 L. J. N. S. 166.

‡ Craig on dem. of Annesley *v.* Earl of Anglesea, 17 St. Tr. 1416; and see the Tracy Peerage, 11 C. and F. 154. Clunnes *v.* Pezzy, 1 Campb. 8. Lawton *v.* Sweeney, 8 Jurist, 964. 1 Greenleaf's L. of Ev. sect. 37.

§ Rex *v.* De la Motte, 21 St. Tr. 810.

which caused his death, was a fact which operated most prejudicially against the prisoner. In his charge to the jury, Mr. Justice Buller laid great stress on that circumstance. "Was there anything so likely," said the learned judge, to lead to a discovery as [*74] the remains, however small they might have *been, of medicine in the bottle? But that is destroyed by the prisoner. In the moment he is doing it, he is found fault with. What does he do next? He takes the second bottle, puts water into that, and rinses it also. He is checked by Lady Boughton, and asked what he meant by it—why he meddled with the bottles? His answer is, he did it to taste it; but did he taste the first bottle? Lady Boughton swears he did not. The next thing he does, is to get all the things sent out of the room; for when the servant comes up, he orders her to take away the bottles, the basin, and the dirty things. He puts the bottles into her hand, and she was going to carry them away, but Lady Boughton stopped her. Why were all these things to be removed? Why was it necessary for the prisoner, who was fully advertised of the consequence by Lady Boughton, to insist upon having everything removed? Why should he be so solicitous to remove everything that might lead to a discovery?"*

In the case of Robert Sawle Donnall, who was tried before Mr. Justice Abbott at Launceston spring assizes, 1817, upon an indictment charging him with the murder of his mother-in-law by poison, a fact of the same kind was adduced in evidence. The contents of the stomach, which had been placed in a jug for examination, were clandestinely thrown by the prisoner into a vessel containing a large quantity of water. Upon this circumstance the learned judge commented very forcibly in his charge to the jury. "What pretence," said he, "was there for this? And if the prisoner did it, why do it in secrecy? Why place the jug in the precise position in which it was left by the medical man? Why not allow it to remain in the situation in which a vessel may be placed in the progress of such an operation?"†

A boatman was tried at Warwick spring assizes, 1836, [*75] *before Mr. Justice Bosanquet, for stealing a quantity of rum which had been delivered to his master, a carrier by canal, for conveyance from Liverpool to Birmingham. The carrier's agent at Liverpool had taken a sample of the spirit and tested its strength. Upon the delivery at its place of destination, the spirit

* Gurney's report, p. 54. † Frazer's Report, p. 171.

was found to be under proof, and the portion abstracted had been replaced with water. The carrier's clerk, on the complaint of the consignee, went to the boat where the prisoner was, in order to require explanation; but as soon as he had stepped into it, the prisoner pushed him back upon the wharf, and forced the boat into the middle of the canal, where he broke three jars and emptied their contents, which by the smell were proved to be rum, into the canal. The prisoner was convicted.*

To this head may be referred the common case of obliteration of marks of identity, as by filing away the engraving from articles of plate, or the removal, or endeavour to remove, from the person or clothes, stains of blood or other marks.

It is not uncommon in cases of supposed poisoning, that great repugnance is manifested by the suspected parties that the body should be submitted to anatomical examination. The expression of such repugnance is a fact to be taken into consideration like all other facts; but it by no means follows that it is to be considered as a mark of conscious guilt. It is well known that many persons have a great prejudice against the anatomical examination of their near connections; much therefore depends upon the situation in life of the parties, and whether they have been nearly related. In a case of this kind, Mr. Baron Rolfe said to the jury, that the question was, from what motive the reluctance arose? On the one hand it was suggested, said the learned Judge, that it was because the prisoner did not *wish the cause of his wife's [*76] death to be investigated, being afraid it would be discovered that she had died from arsenic. On the other hand it was alleged that his reluctance arose from his horror of the notion of his wife's dead body being taken up and exposed to the investigation of the surgeons, at which the feelings were apt to revolt. Many persons no doubt felt very great horror at the notion of such things being done to themselves or those connected with them, whilst others again were indifferent on the subject, leaving their own bodies to be dissected. But few persons liked to have their wives or their daughters so exposed; the prisoner, said the learned judge, might be one of them, and his feelings on that subject might have prompted the remark alleged against him; and surely he must have known that any reluctance expressed by him for an inquiry, or wish to stop it,

* Rex *v.* Thomas.

would only tend to make those who were about to make it, persevere*.

Another common case of suppression of evidence, is the attempt to prevent *post mortem* examination by the premature interment of human remains, under the pretext that it is rendered necessary by the state of the body. In the case of violent or sudden death, and especially when caused by poison, it cannot but be known that the *post mortem* examination will always furnish important, and generally conclusive evidentiary matter as to the cause of death†. In the before-mentioned case of Robert Sawle Donnall, Mr. Justice Abbott told the jury that the conduct of the prisoner—his eagerness in causing the body to be put into a shell, and afterwards to be speedily interred and put out of sight,—was a circumstance most material for their consideration; for that, although the examination of the body and the experiments that were made might not lead [*77] to a certain conclusion, as to the charge stated, that *the deceased got her death by poison administered to her by the prisoner, yet if the prisoner, as a medical man, had been so wicked as to administer that poison, he must have known that the examination of the body would divulge it‡.

The concealment of death by the destruction or attempted destruction of human remains, is a fact of the same kind§. In such cases the presumption of criminality results from the *act* of concealment rather than from the nature of the *means* employed. In a revolting case, where the prisoner admitted that he had cut off the head and legs from the trunk of a female, and concealed the remains in various places, but alleged that her death had taken place by accident while she was in his company, and that in the alarm of the moment, and to prevent suspicion, he had determined to conceal the death, Lord Chief Justice Tindal told the jury that the concealment of death under such circumstances, had always been considered to be a point of the greatest suspicion, but that this evidence must be received with a certain degree of modification, and especially in a case where the feelings might be excited by the singular means of concealment adopted by the prisoner. He made this observation, he said, because although many persons of a strong mind might resist the temptation held out to them, to get rid of suspicion by such

* Reg. *v.* Graham, Carlisle summer assizes, 1845.

† Rex *v.* Donellan, Rex *v.* Donnall, Rex *v.* Burdock, *post.*

‡ Frazer's Rep. p. 170.

§ Rex *v.* Gardelle, 4 Celebrated Trials, 400. Rex *v.* Cook. Reg. *v.* Goode, *post*

means, yet there are others whose determination is so weak as to induce them to adopt such a course to save them from the suspicion of crime. But there was also another class of persons whose minds are of a different kind, and who, from their cunning disposition, would prefer to pursue the crooked way rather than to stand before a statement of the real truth. This point of evidence was therefore for *the consideration of the jury, and it was for [*78] them to judge how far it was a proof of the prisoner's guilt; but the mere general fact of the concealment, added the learned judge, was to be considered, and not the circumstances under which it took place*.

Under this head of evidence may be included all attempts to pollute or disturb the current of truth, or to prevent a fair and impartial trial; as by endeavours to suborn or bribe, or otherwise tamper with the prosecutor or the witnesses, or the officers or ministers of justice; any of which acts, clearly brought home to the prisoner or his authorized agents, are of a most prejudicial and dangerous character.

On the trial of Captain Donellan, Mr. Justice Buller, in his charge to the jury, said, "As to the conduct of the prisoner before the coroner, Lady Boughton had mentioned the circumstance of the prisoner's rinsing out the bottle; one of the coroner's jury swears that he saw him pull her by the sleeve. Why did he do that? If he was innocent, would it not be his wish and anxious desire, as he expresses in his letter, that all possible inquiry should be made? What passes afterwards? When they get home, the prisoner tells his wife that Lady Boughton had given this evidence unnecessarily; that she was not obliged to say anything but in answer to questions that were put to her, and that the question about rinsing out the bottles was not asked her. Did the prisoner mean that she should suppress the truth? that she should endeavour to avoid a discovery as much as she could, by barely saying yes or no to the questions that were asked her, and not disclose the whole truth? If he was innocent, how could the truth affect him? but at that time the circumstance of rinsing the bottles appeared even to him to be so decisive that he stopped her in the instant, and he blamed her afterwards *for having mentioned it. All these," said [*79] the learned judge, "are very strong facts to show what were passing in the prisoner's own mind†."

* Rex *v.* Greenacre, C. C. Court, April 1837, *infra*.

† Gurney's Rep. p. 56.

To this class of facts may also be referred the frequent case of false representations as to the state of another person's health, with the intention of preparing the connections for the event of sudden death, and to diminish the surprise and alarm which in such circumstances follow the occurrence,* and the not unfrequent pretence of having taken part of the draught which has been the cause of death.† So, it is not unusual to endeavor to induce the suspicion of suicide by placing some instrument of destruction in the hand of the murdered party; but consistency is sometimes overlooked by placing the weapon in the left hand.‡

Facts are often simulated for the purpose of attracting suspicion in a direction different from the true one. Cunning is, however, but "a sinister or crooked wisdom;" and not unfrequently the means employed to prevent or avert suspicion lead to detection. Facts of this kind are properly considered as moral indications of a very stringent nature. In the case of Richard Patch, who was convicted at the Surrey spring assizes, 1806, of the murder of Mr. Blight, his partner, the prisoner, a few evenings before the fatal deed, while his friend was at a distance from home, having sent a female servant, the only other inmate of the house, on an errand, fired a ball through the window of the room in which the deceased usually sat at night, doubtless with the intention of creating the impression that some other person was desirous of destroying him. The prisoner's object [*80] was to possess himself of his benefactor's *business and property; and in order to divert suspicion from himself, he affected great tenderness and sorrow.§ But from the course of the ball through the shutter, and other circumstances, it was impossible that it could have been discharged elsewhere than from the deceased's own premises, or by any other person than the prisoner himself.

In the year 1764 a citizen of Liege was found shot, and his own pistol was discovered lying near him; from which circumstance, together with that of no person having been seen to enter or leave the house of the deceased, it was concluded that he had destroyed himself; but on examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol. The real murderers were ultimately discovered,‖ but not until after the terrors

* Rex *v.* Donellan, *ibid.*

† Rex *v.* Wescombe, Exeter summer assizes, 1829.

‡ Rex *v.* Fitter, Warwick autumn assizes, 1824, coram Mr. Justice Taunton.

§ Gurney's Report.

‖ 3 Paris and Fonblanque's Med. Jur. 34, 39.

of the rack had been applied to an innocent girl, the niece of the deceased.

Mary Norkott, John Okeman and Agnes his wife were convicted, in the fourth year of the reign of Charles the First, before Mr. Justice Harvey, of the murder of Jane Norkott under very similar circumstances of this nature. The deceased was found dead in her bed, her throat cut, and a knife sticking in the floor. Several persons who slept in the adjoining room deposed that the deceased went to bed with her child, her husband being absent, and that no person afterwards came into the house. The coroner's jury returned a verdict of *felo-de-se;* but suspicion being excited against these individuals, the jury, whose verdict was not yet drawn up in form, desired that the remains of the deceased might be taken up; and accordingly, thirty days after her death, they were taken up, and the jury charged the prisoners with the murder. They were tried at the Hertford assizes and acquitted, but so much against
*the evidence, that the judge let fall his opinion that it were [*81]
better an appeal were brought than that so foul a murder
should escape unpunished. Accordingly an appeal was brought by the child against his father, grandmother, and aunt, and her husband Okeman. The evidence adduced was, that the deceased lay in a composed manner in her bed, the bedclothes not at all disturbed, that her child lay by her side, and that her throat was cut from ear to ear, and her neck broken. There was no blood in the bed, except a tincture on the bolster where her head lay. From the bed's head there was a stream of blood on the floor, which ran along till it pounded in the bendings of the floor. There was also another stream of blood on the floor at the bed's foot, which pounded also on the floor to a very great quantity; but there was no communication of blood between these two places, nor upon the bed. A bloody knife was found in the morning sticking in the floor, at some distance from the bed; but the point of the knife, as it stuck, was toward the bed, and the handle from the bed, and there was the print of the thumb and fingers of a left hand. Okeman was acquitted, but the others were convicted and executed.*

In the case of John Swan and Elizabeth Jeffreys, who were convicted at the Chelmsford spring assizes, 1752, of the murder of Joseph Jeffreys, the uncle of the female prisoner, it appeared that the deceased was murdered in the night, and that the prisoners gave

* 14 St. Tr. 1324: Beck's Med. Jur. 543.

an alarm of murder from within the house; whereas the undisturbed state of the dew on the grass on the outside rendered it certain that the parties implicated were domestics.*

Sometimes the object of simulated facts is not merely to divert suspicion from the real culprit, but also to attract it *toward [*82] a particular individual:† and such is the weakness of human nature, that there are even instances where innocence has degraded and betrayed itself by the simulation of facts, for the purpose of evading the force of circumstances of apparent suspicion. An instructive case of the kind is mentioned by Sir Edward Coke.‡ "In the county of Warwick," says he, "there were two brethren; the one having issue a daughter, and being seised of lands in fee, devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age: her uncle for some offence correcting her, she was heard to say, 'Oh, good uncle, kill me not!' After which time the child, after much inquiry, could not be heard of: whereupon the uncle, being suspected of the murder of her, the rather for that he was her next heir, was upon examination, anno 8 Jac. Regis, committed to the jail for suspicion of murder, and was admonished by the justices of assize to find out the child, and thereupon bailed until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, he took another child as like unto her both in person and years as he could find, and appareled her like unto the true child, and brought her to the next assizes: but upon view and examination she was found not to be the true child; and upon these presumptions he was indicted, found guilty, had judgment and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to school ran away into the next county; and being well educated, she was received and entertained of a stranger; and when she was sixteen years old, at what time she should come to her *land, she came to de- [*83] mand it, and was directly proved to be the true child." The learned author adds, "We have reported this case for a double caveat: first to judges, that they in case of life judge not

* 14 St. Tr, 1193. 3 Paris and Fonbl. 38. Mascardus De Prob. Concl. cclxxiii. n. 20.

† See the case of Richard Coleman, *ante*, p. 68.

‡ Third Institutes, ch. 104, 232.

too hastily upon bare presumption; and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself as the uncle did."

An unsuccessful attempt to establish an *alibi* is always a circumstance of great weight against the prisoner, because the resort to that kind of defence implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them if they remain uncontradicted; and where the defence of *alibi* fails, it is generally on the ground that the witnesses are disbelieved and the story considered to be a fabrication. From the facility with which this kind of defence may be fabricated, it is commonly entertained with suspicion, and sometimes, perhaps, unjustly so.*

The defence of an *alibi* often involves considerations of the most difficult and perplexing nature. It is not an uncommon artifice to endeavor to give coherence and effect to a fabricated defence of *alibi*, by assigning the events of another day to that on which the offence was committed; so that the events, being true in themselves, are necessarily consistent with each other, and false only as they are applied to the day in question.

Circumstances such as those which have been enumerated, are justly considered to be incompatible with integrity and innocence, and referrible to a consciousness of guilt and a desire to evade the force of facts indicative of it; and they consequently subject the party guilty of them to very unfavorable and injurious inferences.

*SECTION 8. [*84]

STATUTORY PRESUMPTIONS.

Upon the principle of the rule of presumption against persons in whose possession the fruits of crime are discovered recently after its commission, many acts have been constituted legal presumptions of guilt by statute, so as to throw the onus of rebutting or displacing such presumptions, upon the party accused; such, for example, among many others, as the making or possessing, or buying or selling of coining tools or instruments;† the possession of forged bank notes knowing the same to be forged, without lawful excuse;‡ the

* See Rex *v.* Robinson, *post.*

† St. 2 W. IV. c. 30. s. 10.

† St. 11 G. IV. and 1 W. IV. c. 66. s. 12—19, and 28.

possession of marine stores marked with the king's mark,* and the acting or behaving as the master or mistress of a disorderly house.† The revenue laws abound with similar instances of presumptions created for the purpose of protecting the public against infractions of those laws.

By a remarkable anomaly, probably grounded upon some supposed analogy to the rule alluded to, the sale by a shopman of a book or newspaper containing libellous matter, was formerly held to constitute a conclusive presumption of publication by the authority of the master, from the consequences of which he could not protect himself by shewing that such sale was not only unauthorized, but even without his knowledge.‡ This certainly carried the doctrine of agency to an unwarrantable extent. A late statute§ *has now [*85] brought this part of our law into harmony with the other parts of the system, by providing that whensoever, upon any trial for the publication of a libel, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to him to prove that such publication was made without his authority, consent or knowledge, and that it did not arise from want of due care on his part.

Of statutory presumptions this general notice is sufficient, as it is the object of this essay to consider the natural connection between facts and the presumptions to which they lead, and not to enumerate the presumptions created by positive law.‖

It is evident that all such arbitrary presumptions depend for their reasonable force and authority upon the obnoxious character *per se* of the particular acts thus constituted legal presumptions, upon their strict and natural connection and relation, as pregnant evidence of the specific legal offence, and upon the facility of proof by the accused of matter of legal excuse when such matter exists.

In the interpretations of laws which create positive presumptions of guilt, it is essential to distinguish between the letter and the spirit of the enactment; to such laws, the maxim is specially pertinent.

* St. 9 and 10 W. III. c. 41 : and 39 and 40 G. III. c. 89.

† 21 G. III. c 49.

‡ Rex *v.* Almon, 20 St. Tr. 803. Rex *v.* Cuthell, 27, *ib.* 641.

§ St. 6 and 7 Vict. c. 69. s. 7.

‖ See a copious collection of such presumptions, 1 Taylor's L. of Ev. 65. 96, 103, 269.

"*scire leges, non est earum verba tenere, sed vim ac potestatem**." It is not practicable to predicate all the cases which may fall within the language of the rule, or to anticipate the necessary exceptions which a proper regard to the intention of the legislature would exclude from its operation, and which it is reasonable to conclude that the legislature would have *expressly excluded if they [*86] had been foreseen. However peremptory and apparently conclusive, therefore, the language of such enactments may be, it is not allowed to exclude or control the just force and operation of such concommitant circumstances as tend to repel the presumption of the *malus animus* arising from the bare facts which constitute the presumption.† The following cases illustrate the necessity of thus controlling the application of positive presumptions, by such qualifying considerations as must be supposed to have been within the contemplation of the legislature though it has not expressed them in words.

A widow woman was indicted before Mr. Justice Foster on the 9th and 10th William III. c. 41, for having in her custody divers pieces of canvas marked with the king's mark, she not being employed by the Commissioners of the Navy to make the same for the king's use. The canvas was marked as charged in the indictment, and was clearly proved to be such as was made for the use of the navy, and to have been found in the defendant's custody. The defendant did not attempt to show that she was within any exception of the act, as being a person employed to make canvas for the navy; nor did she offer to produce any certificate from any officer of the crown, touching the occasion of such canvas coming into her possession. Her defence was, that when there happened to be in His Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons entrusted with the stores to make a public sale of them in lots larger or smaller, as best suited the purpose of the buyers; and that the canvas produced in evidence, which had been made up long since, some for table linen, and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death; *and [*87] upon his death came to the defendant, and had been used in the same open manner by her to the time of prosecution. The counsel for the crown insisted that as the act allows of but one excuse, the defendant, unless she could avail herself of that, could not resort to any other, that, if the canvas were really bought of the

* L. 47. § de legibus. † Puffendorf, lib. v. c. 12. 2 East's P. C. 765.

commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase, and that the second section admits of no other excuse. But the learned judge was of opinion, that though the clause of the statute which directs the sale of these things had not pointed out any other way of indemnifying the buyer than the certificate, and though the second section seemed to exclude any other excuse for those in whose custody they shall be found, yet still the circumstances attending every case which might seem to fall within the act, ought to be taken into consideration; otherwise a law calculated for wise purposes, might by a too rigid construction of it, be made a handle for oppression. There was no room to say that this canvas came into the possession of the defendant by any act of her own; it was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of that kind had frequently been exposed to public sale; and though the act pointed out an expedient for the indemnity of buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested to them by the act. And if the defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury; and directed them, that if upon the whole evidence they were of opinion that the de-
[*88] fendant *came to the possession of the linen without any fraud or misbehavior on her part, they would acquit her; and she was accordingly acquitted.*

In a similar case Lord Kenyon said, that though in prosecutions under the statutes 9 and 10 Will. III. c. 41, and 17 Geo. II. c. 40. s. 10, it was sufficient for the crown to prove the finding of the stores with the king's mark in the defendant's possession, to call upon him to account for that possession, so as to throw upon him the onus of proving that he had legally become possessed of them, yet that he had other means of showing that he had lawfully become possessed of them than by the production of the certificate from the navy board; as for example, he might show that he had bought them from another person who was in the habit of buying stores at the navy sales, and who therefore might fairly be presumed to have had the regular certificate, but who, when he sold

* Foster's C. L. App. 439.

part to the defendant, could not, consistently with his own safety, part with the certificate he had obtained of his having been the purchaser of the whole lot.*

Upon an indictment on the statute 5 and 6 Will. IV. c. 19, which makes it a misdemeanour in the master of a vessel to leave a seaman behind, and enacts that the only defence which he can set up is the production of the certificate of the consul or other party mentioned in the statute, it was held nevertheless that a defendant might show that it was impracticable to obtain such certificate,† and that, even before such qualification was introduced into the subsequent statute, 7 and 8 Vict. c. 112. s. 48.

In like manner, although the repealed statute 27 Jac. 1, c. 17. made the concealment of the death of an illegitimate child conclusive evidence of murder by the mother, except *she could prove by one witness at least that it was actually born dead, [*89] nevertheless in the construction of that law it has always been usual, at least of late years, to require that some sort of presumptive evidence should be given that the child was born alive, before the other constrained presumption that the child whose death was concealed was therefore killed by its parent, was admitted to convict the prisoner.‡

* Rex *v.* Banks, 1 Esp. 144.

† Reg *v.* Dunnet, 1 C. and K. 425.

‡ 4 Bl. Comm. 198.

[*90]

*CHAPTER IV.

EXTRINSIC AND MECHANICAL INCULPATORY INDICATIONS.

INCULPATORY circumstances of an extrinsic and mechanical nature, are such as are derived from the physical peculiarities and characteristics of persons and things,—from facts and objects which bear a relation to our corporeal nature, and are apparently independent of moral indications. Such facts are intimately related to, and as it were dovetail with the *corpus delicti;* and they are the links which establish the connection between the guilty act and its invisible moral origin. It is impossible even to classify, and still less to attempt an enumeration of, evidentiary facts of the kind in question; but it may be interesting and instructive, by way of illustration, to advert to some of the principal heads of evidence of this kind, and to some remarkable cases which have occurred in the records of our criminal jurisprudence.

The principal facts of circumstantial evidence, of an external character, relate to questions of identity,—(1) of person; (2) of things; (3) of hand-writing; and (4) of time; but there must necessarily be a number of isolated facts which admit of no more specific classification.

SECTION 1.

IDENTIFICATION OF PERSON.

IT might be concluded, by persons not conversant with judicial proceedings, that personal identification is seldom attended
[*91] with serious difficulty, but such is not the case. *Illustrations are numerous to show that what are supposed to be the clearest intimations of the senses, are sometimes fallacious and deceptive, and some extraordinary cases have occurred of mistaken personal identity.* Hence the particularity, and, as unreflecting persons too hastily conclude, the frivolous minuteness of inquiry, by professional advocates as to the *causa scientiæ*, in cases of controverted identity, whether of person or of things.

* Rex *v.* Wood and Brown, *ante*, p. 31. Rex *v.* Coleman, *ante*, p. 68.

Two men were convicted at the Old Bailey sessions in 1797, before Mr. Justice Grose, of the murder of Syder Fryer, Esq., and executed; the identity of the prisoners was positively sworn to by a lady who was in company with the deceased at the time of the robbery and murder; but several years afterwards two men, who suffered for other crimes, confessed at the scaffold the commission of the murder for which these persons were executed*.

A young man, articled to an attorney, was tried at the Old Bailey on the 17th and 19th of July 1824, on five indictments for different acts of theft. A person resembling the prisoner in size and general appearance had called at various shops in the metropolis for the purpose of looking at books, jewellery and other articles, with the pretended intention of making purchases, but made off with the property placed before him while the shopkeepers were engaged in looking out other articles. In each of these cases the prisoner was positively identified by several persons, while in the majority of them an *alibi* was as clearly and positively established; and the young man was proved to be of orderly habits and irreproachable character, and under no temptation from want of money to resort to acts of dishonesty. Similar depredations on other tradesmen had been committed by a person resembling the *prison- [*92] er, and those persons deposed that, though there was a considerable resemblance to the prisoner, he was not the person who had robbed them. The prisoner was convicted upon one indictment, but acquitted on all the others; and the judge and jurors who tried the last three cases expressed their conviction that the witnesses had been mistaken, and that the prosecutors had been robbed by another person resembling the prisoner. A pardon was immediately procured in respect of that charge on which conviction had taken place†.

A few months before the last-mentioned case a respectable young man was tried for a highway robbery committed at Bethnal Green, in which neighbourhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who robbed him of his watch. A young woman to whom the prisoner paid his addresses, gave evidence which proved a complete *alibi*. The prosecutor was then ordered out of court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor

* Rex v. Clinch and Mackley, 3 P. and F. 144.

† Rex v. Robinson, Sessions Papers, 1824.

was again put up into the witness-box and addressed thus: "Remember, the life of this young man depends upon your reply to the question I am about to put, Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when beholding two men so nearly alike he became petrified with astonishment, dropped his hat, and was speechless for a time, but at length declined swearing to either. The prisoner was of course acquitted. The other young man was tried for another offence and executed; and a few hours before his death acknowledged that he had committed the robbery in question*.

[*93] *As incidental to the establishment of identity, the quantity of light necessary to enable a witness to form a satisfactory opinion has occasionally become the subject of discussion. A man was tried January 12th, 1799, for shooting at three Bow-street officers, who, in consequence of several robberies having been committed near Hunslow, were employed to scour that neighbourhood. They were attacked in a post-chaise in the evening of the 10th of November by two persons on horseback, one of whom stationed himself at the head of the horses, and the other went to the side of the chaise. One of the officers stated that the night was dark, but that from the flash of the pistols he could distinctly see that it was a dark brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head and thick shoulders, and such that he could select him out of fifty horses, and that he had seen the horse since at a stable in Long Acre. He also perceived, that the person at the side glass, had on a rough shag great coat†. Similar evidence was given on a trial for high treason‡. In a case of burglary before the Special Commission at York, January 1813, a witness stated that a man came into his room in the night, and caused a light by striking on the stone floor with something like a sword, which produced a flash near his face, which enabled him to observe that his forehead and cheeks were blacked over in streaks, that he had on a dark-coloured top coat and a dark-coloured handkerchief, and was a large man, from which circumstances and from his voice, he believed the prisoner to be the same man§.

* 3 P. and F. 143, where, and in Beck's Med. Jur. p. 372, see other cases of mistaken identity.

† Rex *v.* Haines, 3 P. and F. 144.

‡ Rex *v.* Byrne, 18 St. Tr. 819.

§ Rex *v.* Brook, 31 St. Tr. 1137; but see Traité de la Preuve, par Desquiron,

*Happily cases of mistaken personal identity have not [94]
been numerous in the English Courts of Justice; but
there must of necessity be a greater liability to error, where the question of identity is matter of deduction and inference, than where it is the subject of the direct evidence of the senses. The circumstances from which identity may be thus inferred are innumerable, and admit of only a very general classification, of which the following are perhaps the most remarkable heads.

Family likeness has often been insisted upon as a reason for inferring parentage and identity. In the Douglas case Lord Mansfield said: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather, as the distinction between individuals in the human species is more discernible than in other animals; a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things; whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude and action*." But in a case in Scotland, where the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father, was held to be not relevant, as being too much a matter of fancy and loose opinion to form a material article of evidence†.

A case of capital conviction occurred a few years ago
at Lincoln assizes for a crime, for which the prisoner *suf- [*95]
fered; which took place in consequence of his having
given his portrait to a youth, which enabled the police, after watching a month in London, to recognise and apprehend the wretched culprit‡. It is well known that shepherds readily identify their

274, where it is stated that after the condemnation of a man for murder, on the testimony of two witnesses, they recognised him by the light from the discharge of a gun, experiments were made from which it appeared that such recognition was impossible.

* Collectanea Juridica, ii. 402. Beck's Med. Jur. p. 371; and see the case of Doe dem. of Day *v.* Day, at Huntingdon assizes, 31st July, 1793; printed by Butterworth, 1823.

† Rutlege *v.* Carruthers, Tait's L. of Ev. p. 443.

‡ Rex *v.* Arden, 8 London Med. Gaz. 36.

sheep, however intermingled with others*. Offenders have not unfrequently been recognised by the voice†. Circumstances sometimes extraordinarily contribute to identification, by confining suspicion and consequently limiting the range of inquiry to a class of persons; as in the case mentioned in a former page, of two persons convicted of murder, who had created an alarm from within the house; but, nevertheless, suspicion fell upon them from the circumstance that the dew on the grass surrounding the house had not been disturbed on the morning of the murder, which must have been the case had it been committed by any other than inmates‡.

Identification is often satisfactorily inferred from the correspondence of fragments of garments, or written or printed papers, or other articles found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise related to the *corpus delicti*§; or by means of wounds or marks inflicted upon the person of the offender. A woman was tried at Warwick spring assizes, 1818, before Mr. Baron Garrow, for the crime of arson. The prisoner had been met near the ricks which were set on fire, about two hours after midnight. A tinder-box was found near the spot containing some unburnt cotton rag, and a piece of a woman's neckerchief was found in one of
[*96] the ricks where *the fire had been extinguished. The piece of cotton in the tinder-box was examined with a lens, and the witness deposed that it was of the same fabric and pattern as a gown and some pieces of cotton print taken from the prisoner's box at her lodgings. A half neckerchief taken from a bundle belonging to the prisoner, and found in her lodgings, corresponded with the colour, pattern, and fabric of the piece found in the rick, and it was deposed that they had both belonged to the same square; and from the breadth of the hemming, and the distance of the stitches on both pieces, as well as from the circumstance that both pieces, were hemmed with black sewing silk of the same quality (whereas articles of that description were generally sewed with cotton), the witness clearly inferred that they were the work of the same person. The prisoner was capitally convicted, but there

* Rex *v.* Oliver, 1 Syme's Justiciary Rep. 224.

† Rex *v.* Brook, *ante*, p. 93.

‡ Rex *v.* Jefferys and Swan, 18 St. Tr. 1193; and see Mascardus De Prob. Conclusio CCLXXII.

§ See Mascardus De Prob. Concl. DCCCXXXI.

being reason to believe that she was of unsound mind, she was reprieved. Evidence of this kind must however, be admitted with caution. On the trial of a young woman for child murder, it appeared that the body of a newly-born female child was found in a pond about a hundred yards from her master's house, dressed in a shirt and cap; and a female witness deposed that the stay or tie which was pinned to the cap and made of spotted linen, was made of the same stuff as a cap found in the prisoner's box; but a mercer declared that the two pieces were not only unlike in pattern, but different in quality*.

In a case of burglary the thief had gained admittance to the house by means of a penknife, which was broken in the attempt, and part left in the window-frame; the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left†.

*At Stafford summer assizes, 1835, a man was convicted [*97] of an attempt to murder, by sending to the prosecutor on the 11th of May preceding, a parcel consisting of a tin case which contained several pounds of gunpowder, so packed as to explode by the ignition of detonating powder, inclosed between two pieces of paper, connected with a match fastened to the bottom and to the lid of the box. It was a conclusive circumstance against the prisoner that underneath the outer covering of brown paper, in which the case and combustible matter had been inclosed, was found a portion of the Leeds Intelligencer of the 5th of July, 1832, the remaining portion of that identical paper having been found in the prisoner's house.‡ In another case identification was established by the correspondence of the wadding of fire-arms with part of a torn letter found in the prisoner's possession;§ and in a case on the Northern circuit where a man had been shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad, which corresponded with another part found in the pocket of the prisoner.‖

William Heath and Elizabeth Crowder were charged at Glasgow, September 1831, with breaking into a bank in that city, and steal-

* Rex *v.* Bate, Warwick autumn assizes, 1809, before Mr. Justice Le Blanc; and see Rex *v.* Webster, *post.*

† 1 Stark. L. of Ev. 103.

‡ Rex *v.* Mountford, 1 Moody's C. C. 441.

§ P. and F. 39; and 1 Starkie's L. of Ev. 498.

‖ Bentham's Jud. Ev. book v. ch. xv. 256; and see Hansard's Parl. Deb. vol. iii. p. 1740 (third series,) where the case is related by Lord Eldon.

ing $6000. The bank was safely locked up on the 24th of December, and it was found to have been broken into when the clerks returned on the morning of the 26th, the intervening day having been a holiday. The iron safes had all been forced open. The male prisoner Heath had been seen in Virginia Street, more than once, about three weeks before the robbery. On Christmas-day [*98] a woman extremely like the female prisoner rang at *the bank door, and repeatedly looked past the servant who opened the door up the stairs. The prisoners came to Glasgow about six weeks before the theft, living together, and left their first lodgings about a fortnight before Christmas for others, in which they lived till Christmas-day, when they finally left them. They frequently went out carrying a box, which they always brought back; and when at home they were often engaged, with the windows closed in a noisy work like breaking of iron with hammers. On the day of the theft they were seen in Virginia Street by two witnesses lingering about during the time of Divine service. Heath, the male prisoner, had repeatedly called at an ironmonger's in Glasgow for some weeks previously to obtain blank keys, and to get them bored and altered; and that ironmonger identified a fragment of a key, found in the lock of one of the safes, as what he had made for him. On the dresser of the lodging which the prisoners occupied in Glasgow were found circles, such as would have been produced by making keys similar to one of which a fragment was found in the safe of the bank which was robbed; and the catches of a vice found in Crowder's house in London coincided with the markings on a board in Heath's lodgings in Glasgow. On the day after the theft the prisoner Heath set off in the coach to Edinburgh under a feigned name, and was traced in the mail from Edinburgh to London. On the 31st of December he was found at a jeweller's shop in Dover exchanging two Scotch notes for French gold; and to the mate of the steamboat between Dover and Calais, a person resembling the prisoner Heath tendered a twenty-pound Scotch note. In their declarations both prisoner refused to answer any questions. Upon this evidence Heath was convicted and executed, and Crowder escaped, by a verdict of 'Not proven.'*

[*99] *Gomez Palayo, a Spaniard, was tried at the Liverpool quarter sessions on the 28th of October 1836, for having occasioned a grievous injury to an officer of the post-office, by means

* Alison's Princ. of the C. L. of Scotland, p. 318.

of several packets containing fulminating powder, put by him into the post-office, one of which exploded in the act of stamping. The letters, which were in Spanish, and one of them subscribed with the prisoner's name, were addressed to persons at Havannah and Matanzas, who appeared to be the objects of the writer's malignant intention. There was no proof that the letters were in the prisoner's handwriting, but he was proved to have landed at Liverpool on the 20th of September, and to have put several letters into the post-office on the evening of the 22nd of that month, the explosion having occurred on the 24th ; and there was found upon his person a seal which corresponded with the impression upon the letters, which circumstance (though there were other strong facts) was justly considered as conclusive of the prisoner's guilt, and he was accordingly convicted and sentenced to two years' imprisonment.

Circumstances like those which have been enumerated have always been considered to afford strong *prima facie* ground of adverse presumption, unless satisfactorily explained and accounted for.* Nevertheless the effect of such circumstances may, like all other presumptions, be repelled or neutralized ; and there have been cases in which similar circumstances of presumption, though they have appeared to be conclusive, have turned out to be fallacious.†

In like manner the impressions of shoes, or other articles of apparel, or of nails, patches, abrasions or other peculiarities therein, in the soil or clay, or snow, at or near the scene of crime, and discovered recently after its commission, fre-
*quently lead to the identification and conviction of the [*100]
guilty parties.‡ The presumption founded on these circumstances is appealed to by all mankind in all ages, and in inquiries of every kind, and it is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance. The following remarkable cases illustrate the pertinency and weight of such mechanical facts, especially when connected with other concurring circumstances leading to the same result.

At Warwick spring assizes, 1816, Isaac Brindley was tried for the murder of Ann Smith, a female fellow-servant at a farm-house. The deceased, who was about to go into another situation, asked the prisoner to carry a box for her to the gardener's house, about a

* Mascardus, Concl. dcccxxx. i. pl. 10.

† Rex *v.* Looker, *post.*

‡ Menochius Ce Præs. lib. v. præs. 31. Mascardus, Concl. cccxx. pl. 11. Traité de la Preuve, par Mittermaier, (traduit par Alexandre,) ch. 57.

quarter of a mile distant. A little before seven in the evening the deceased went on an errand to take some barm to a neighbouring house, but it not being wanted she set out to bring it back. Soon after the deceased set out from her master's house, the prisoner followed her carrying the box, but he did not reach the gardener's house until after eight. The time was fixed from the circumstance of the gardener's clock having stopped when wound up soon after the prisoner left the house. The deceased did not return home, and on the following morning she was found drowned in a pit near a foot-path leading from the gardener's house to her master's; and one of her shoes and the jug in which she had carried the barm were found near the pit. Some barm was spilt near the spot, and there were marks of much trampling; and there were also some wheat chaff and grains of wheat about, which were material facts, the prisoner having been engaged the preceding day in threshing wheat. The prisoner gave a false account of himself during his tem-
[*101] porary *absence on the preceding evening. Impressions were found in the soil, which was stiff and retentive, of the knee of a man who had worn breeches made of striped corduroy, and patched with the same material, but the patch was not set on straight, the ribs of the patch meeting the hollows of the garment into which it had been inserted; which circumstances exactly corresponded with the prisoner's dress; he was convicted and executed.

William Beards was tried before Mr. Sergeant Atcherly at Stafford summer assizes, 1844, for the murder of an elderly woman who lived as housekeeper with Mr. Crowther at Wednesbury. The deceased, her master, and a male servant were the only inmates of the house. Mr. Crowther went from home on Saturday morning the 16th of March, about half past nine o'clock, as was his habit on that day of the week, leaving the deceased in the house alone. Upon his return, about a quarter before two, he found the dead body of his housekeeper in the brewhouse, her throat having been cut and the house robbed. The murder had probably been committed about a quarter past ten o'clock, as the butcher called at that time and had been unable to obtain admittance, and about the same time a scream was heard. Traces were found of a man's right and left footsteps leading from a stable in a small plantation near the front of the house, from which any person leaving the house by the front door could be seen; and similar footsteps were found at the back of the house leading from thence across a ploughed field for a considerable distance in a sequestered direction, until they reached a canal bank,

where they were lost in the hard ground. From the distance between the steps at the back of the house and in the ploughed field, the person whose footsteps they were must have been running; the impressions were those of right and left boots and were very distinct, there having been snow and rain, and the ground being *very moist. The right footprints had the mark of [*102] a tip round the heel; the impressions of the left foot had a patch fastened to the sole with nails different in size from those on the sole itself; and altogether there were four different sorts of nails on the patch and soles, and in some places the nails were missing. Suspicion fell upon the prisoner, who had formerly lived as fellow servant with the deceased, and had been seen by several persons in the vicinity of the house a little before ten o'clock on the morning of the murder. Upon his apprehension on the following morning, his boots, trowsers, shirt, and other garments were found to be stained with blood, and the trowsers had been rubbed or scraped, as if to obliterate stains. The prisoner wore right and left boots, which were carefully compared with the footprints; first by making impressions of the soles in the soil about six inches from the original footmarks; and they were found exactly to correspond as to the patch, the tip and the number, shape, sizes and arrangement of the nails. The boots were then placed lightly upon the original impressions so as not to vary them, but merely to ascertain if they fitted; here again the correspondence was exact. There could therefore be no doubt that the impressions of all these footsteps had been made by the prisoner's boots. The prisoner was seen about a quarter before eleven on the morning of the murder with something bulky under his coat, near the place where the footsteps were lost on the hard ground, and proceeding thence towards the town of Wednesbury. At about eleven o'clock he called at the Pack Horse in that place, not far from Mr. Crowther's house, where he took something to drink and immediately left. At a little after twelve the prisoner called at another public house, which was also near to Mr. Crowther's, where he staid some time smoking and drinking. In the interval between the times when the prisoner had called at these public houses, he was seen at some distance *from them, [*103] near an old whimsey; and he was subsequently seen returning in the opposite direction towards Wednesbury. Five days afterwards, upon a further search, the same footprints were discovered on a footpath leading in a direction from the Pack Horse towards the whimsey, where two bricks appeared to have been placed to

stand upon, and close to which was found an impression of a right foot corresponding with the impression which had been before discovered; and in the flue was found concealed a handkerchief in which were tied up a pair of trowsers and waistcoat, which had belonged to Mr. Crowther, and had been stolen from his house. The prisoner must have availed himself of the interval between the times when he was seen at the two public houses, to secrete the stolen garments in the whimsey, and thus to divest himself of the bulky articles which had been observed under his coat on his arrival at the Pack Horse. No attempt was made to show that the prisoner was elsewhere at the time of the murder; but it was proved that about a week before, while assisting to hang up a dead pig, some blood had fallen upon his coat. It was alleged, but not proved, that it was common for excavators (like the prisoner) to have a patch put upon the left boot with extra nails, to prevent the boot wearing out by the use of the spade, and that great numbers of similar boots were supplied by the contractors to their workmen, made from the same last, and by the same person who put on the nails in the same form. The jury after deliberating several hours found the prisoner guilty, and he afterwards made a full confession, and was executed pursuant to his sentence.*

To guard against error, it is manifest that the recency of the discovery and comparison of the impressions, relatively to
[*104] the time of the occurrence of the *corpus delicti*, *and before other persons may have resorted to the spot, is of the highest importance. So, the accuracy of the comparison is obviously all important, and therefore as a further means of guarding against mistake, it must be shewn that the shoes were compared with the footmarks before they were put on them;† and where the comparison had not been previously made, Mr. Justice Park desired the jury to reject the whole inquiry relating to the identification by shoemarks.‡. Nor must it be overlooked, that, even where the identity of the footmarks is established beyond all doubt, they may have been fabricated with the intention of diverting suspicion from the real offender, and fixing it upon an innocent party;§ and that in

* For other cases of this kind see Rex *v.* Richardson, and Rex *v.* Smith and others, *post*.

† Rex *v.* Heaton, 1 Lewin's C. C. 116.

‡ Rex *v.* Shaw, *ib.*

§ See the remarkable case of Francois Mayenc, Gabriel, *ut supra*, 403, and The Theory of Presumptive Proof, App. 102.

other respects this kind of evidence may lead to erroneous interpretation and inference.*

SECTION 2.

IDENTIFICATION OF ARTICLES OF PROPERTY.

The identification of articles of property, like that of the human person, is capable of being established by means of numberless circumstances which it is not possible to classify or enumerate. Most of the cases of identification which have been enumerated in the preceding section, are in fact cases of identification of articles of property, applied inferentially to the establishment of personal identity, and sufficiently illustrate the difficulties which attend investigations of this kind. It is obviously of the greatest importance, in all cases where witnesses testify to questions of identity, to sift with extreme rigour the *causa scientiæ*. The following cases, as well as others which have been *already mentioned, show how [*105] liable even well intentioned witnesses, who speak to facts of this particular kind are to error and misconception.

At the spring assizes, at Bury St. Edmunds, a respectable farmer, occupying 1200 acres of land, was tried for a burglary and stealing a variety of articles. Amongst the articles stolen were a pair of sheets and a cask, which were alleged to have been shortly after the theft found in the possession of the prisoner, and were positively sworn to by the witnesses for the prosecution to be those which had been stolen. The sheets were identified by a particular stain, and the cask by the mark "P. C. 84." inclosed in a circle at one end of it. On the other hand, a number of witnesses swore to the sheets being the prisoner's, by the same mark by which they had been identified by the witnesses on the other side as being the prosecutor's. With respect to the cask, it was proved by numerous witnesses, whose respectability left no doubt of the truth of their testimony, that the prisoner was in the habit of using cranberries in his establishment, and that they came in casks, of which the cask in question was one. In addition to this, it was proved that the prisoner purchased his cranberries from a tradesman in Norwich, whose casks were all marked "P. C. 84." inclosed in a circle, precisely as the prisoner's were, the letters P. C. being the initials of his

* Rex *v.* Thornton, *post*.

name, and that the cask in question was one of them. In summing up, the learned judge remarked, that this was one of the most extraordinary cases ever tried, and that it certainly appeared that the witnesses for the prosecution were mistaken. The prisoner was acquitted*.

A man was tried in Scotland for housebreaking and theft. The girl whose chest had been broken open, and whose clothes
[*106] had been carried off, swore to the only *article found in the prisoner's possession, and produced, namely, a white gown, as being her property. She had previously described the colour, quality and fashion of the gown, and they all seemed to correspond with the article produced. The housebreaking being clearly proved, and the goods, as it was thought, clearly traced, the case was about to be closed by the prosecutor, when it occurred to one of the jury to cause the girl to put on the gown. This appeared rather a whimsical proposal, but it was agreed to by the court; when, to the surprise of every one present, it turned out that the gown which the girl had sworn to as belonging to her,—which corresponded with her description, and which she said she had worn only a short time before,—would not fit her person. She then examined it more minutely, and at length said it was not her gown, though almost in every respect resembling it. The prisoner was, of course, acquitted; and it turned out afterwards that the gown produced belonged to another woman, whose house had been broken into about the same period, by the same person, but of which no evidence had at that time been produced†.

A few years ago a youth was convicted at Stafford assizes, of stealing a pocket-book containing a five-pound note, under very extraordinary circumstances. The prosecutrix left home to go to market in a neighbouring town, and having stooped down to look at some vegetables exposed to sale, she felt a hand resting upon her shoulder, which on rising up she found to be the prisoner's. Having afterwards purchased some articles at a grocer's shop, on searching for her pocket-book in order to pay for them she found it gone. Her suspicion fell upon the prisoner, who was apprehended, and upon his person was found a black pocket-book, which she identified as that which she had lost, but it contained no money.
[*107] Several witnesses proved that the *prisoner had long possessed the pocket-book; but some discrepancy in their

* A. R. 1830, p. 50; the report was supplied by a barrister of eminence.

† Rex *v.* Webster, Burnett's C. L. of Scot. p. 558. 19 St. Tr. 494.

evidence in other respects led to the suspicion that the defence was a fabricated one, and the jury returned a verdict of guilty, and the prisoner was sentenced to be transported. During the continuance of the assizes, two men who were mowing a field of oats through which the path lay by which the prosecutrix had gone to market, found in the oats close to the path a black pocket-book containing a five pound note. The men took the money and pocket-book to the prosecutrix, who immediately recognised them, and the committing magistrate despatched a messenger with the articles found, and her affidavit of identity to the judge at the assize town. The prosecutrix must have dropped her pocket-book, or drawn it from her pocket with her pocket-handkerchief, and had clearly been mistaken as to the identity of the pocket-book produced upon the trial*.

It is not, however, indispensably necessary that the identification of stolen property should be invariably established by positive evidence. In many cases identification by positive evidence is impracticable; and yet the circumstances may render it impossible to doubt that the property has been stolen, or to account for the possession of it by the party accused upon any reasonable hypothesis consistent with his innocence; as in the case of labourers employed in docks, warehouses, or other such establishments, found in possession of corn, sugar, tobacco, or other like articles concealed about the person, or clandestinely disposed of under pregnant circumstances of suspicion. In such cases the similarity or general resemblance of the article stolen with that found, is sufficient†. The following is a remarkable case of this kind.

*At Glasgow spring circuit, 1828, two men were tried for stealing a quantity of soap from a soap manufactory [*108] near that city, which was broken into on a Saturday night by boring a hole in the wall, and 120 lbs. of yellow soap abstracted. On the same night, at eleven o'clock, the prisoners were met by a watchman near the centre of the city, one of them having 40 lbs. of yellow soap on his back, and the other with his clothes greased all over with the same substance. The prisoners, on seeing the watchman, attempted to escape, but they were seized. The owner declared that the soap was exactly of the same kind, size and shape, with that abstracted from his manufactory; but, as it had no private mark, it could not be identified more distinctly. One of the prison-

* Rex v. Carter, *coram* Mr. Baron Garrow.

† 2 East's P. C. 637. 2 Russell on Crimes, (by Greaves), 107. Rex v. White, R. and R. 508.

ers had formerly been a servant about the premises, and both in their declarations alleged that they got the soap in a public house from a man whom they did not know. They were convicted and transported for seven years*.

SECTION 3.

PROOF OF HANDWRITING.

THE usual mode of proving handwriting is, by the direct testimony of some witness, who has either seen the party write, or acquired a knowledge of his handwriting from having corresponded with him and had transactions in business with him, on the faith that letters purporting to have been written or signed by him were genuine. In either case, the witness is supposed to have received into his mind an impression of the general character of the handwriting of the party, impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, [*109] and which is therefore itself permanent; *and he is called on to speak to the writing in question by a reference to the standard so formed in his mind.†

It is necessary to recall these leading principles of proof of handwriting by direct evidence, as introductory to the consideration of the various methods of proof by indirect evidence.

Evidence of similitude of handwriting by the comparison of controverted writing with the admitted or proved writing of the party, made by a witness who has never seen the party write, or has any knowledge of his handwriting, and who arrives at the inference that it is his handwriting because it is like some other which is so,‡ is a mode of proof which has been much lauded by writers on the civil law, and is commonly admitted in many countries; but in that case the comparison is made by professional *experts* appointed by the Court or agreed upon by the parties, and under many restrictions for securing the genuineness of the writings which are to form the standard of comparison.

Such evidence is in general inadmissible in this country; and the

* Rex *v.* M'Kechnie and Tolmei, Alison's Princ., *ut supra*, 322.

† Per Coleridge, J. in Doe d. Mudd *v.* Suckermore, 5 A. and E. 705.

‡ Benth. Jud. Ev. b. iii. ch. 7. Rex *v.* De la Motte, 21 St. Tr. 810.

only admitted exceptions are, where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient writing.* In these excepted cases, the evidence is admitted, it is said, of necessity,—in the former case because it is not possible to prevent the jury from making such comparison, and therefore it is best, as was remarked by Lord Denman,† for the Court to enter with the jury into that inquiry, and do the best it can under circumstances which cannot be helped,—in the latter because from the lapse of time no living person [*110] can have any knowledge of the handwriting from his own observation,‡ and because in ancient documents it often becomes a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it being materially assisted by antiquarian researches.§

The evidence of persons accustomed to the critical examination of handwriting, as engravers and inspectors of franks, who, without any previous knowledge of a person's handwriting, profess to be able to determine by comparison of the disputed with the genuine writing, whether a signature be genuine or not, and also from the general character and appearance of writing, whether it be written in a natural or feigned hand, appears to have been formerly considered as another exception to the rule;‖ but such evidence is now justly considered to be of so little weight, and attempts to introduce it are so much discountenanced, that, in the language of Lord Denman,¶ this chapter may be considered as expunged from the book of evidence.**

An attempt has lately been made to introduce a new mode of proof, by satisfying the witness by some information or evidence, that certain papers are in the handwriting of the prrty, and then desiring him to study those papers, so as to acquire a knowledge of

* Allport *v.* Meek, 4 C. and P. 267. Bromage *v.* Rice, 7 *ib.* 548. Waddington *v.* Cousins, *ib.* 595. Griffith *v.* Williams, 1 C. and J. 47. Doe d. Perry *v.* Newton, 1 N. and P. 1, and 5 A. and E. 514. Solita *v.* Yarrow, 1 M. and R. 133. Griffits *v.* Ivery, 11 A. and E. 222.

† In Doe d. Perry *v.* Newton, *ut supra.*

‡ Per Mr. J. Patteson in Doe d. M dd *v.* Suckermore, *ut supra.*

§ Per Coleridge, J. *ib.*

‖ Goodtitle *v.* Revett, 4 T. R. 49 ; Rex *v.* Cator, 4 Esp. 117. Rex *v.* Johnson, 29 St. Tr. 81.

¶ Doe d. Mudd *v.* Suckermore, *ut supra.*

** Gurney *v.* Langlands, 5 B. and Ald. 330. Constable *v.* Steibel, 1 Hagg. 56. Young *v.* Brown, *ib.* 569. Fitzwalter Peerage, 10 C. and F. 193. Tracy Peerage *ib.* 154.

the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question and asking [*111] his belief respecting it; or by merely putting certain papers into the witness's hand, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards showing him the writing in question and asking his belief, whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party.* The question in the cause was the due execution of a will. On the first day of the trial the defendant called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of them being in evidence for any other purpose of the cause,) and he stated that he believed them to be his. On the following day the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was a Bank-inspector, who had no knowledge of the handwriting of the supposed attesting witness, except from having previous to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in court. Mr. Justice Vaughan rejected the evidence; and upon a motion for a new trial, on the ground of its improper rejection, the Judges of the Court of Queen's Bench were equally divided in opinion.†

Evidence to handwriting is subject to many sources of fallacy and error, among which may be enumerated tuition by the same receptor, employment with other persons in the same place of business, as well as designed imitation, all of which are frequently causes of great similarity in writing. Men in certain businesses [*112] and professions *sometimes adopt peculiarities of character, though less frequently than formerly; and there are characteristic peculiarities indicative of age, infirmity and sex.‡

Handwriting is sometimes most successfully imitated. On a trial for forgery of bank-notes, a banker's clerk whose name was on one of the notes swore distinctly that it was his handwriting, while he spoke hesitatingly with respect to his genuine subscription.§ Lord

* Per Mr. Justice Patteson in Doe dem. Mudd *v.* Suckermore, 5 A. and E. 703.

† See also Griffits *v.* Ivery, 11 A. and E. 322. Hughes *v.* Rogers, 8 M. and W. 123. Young *v.* Horner, 2 M. and R. 573, and 1 C. and K. 51.

‡ See Rex *v.* Johnson, 29 St. Tr. 81.

§ Rex *v.* Carsewell, Burnett's C. L. of Scotl. 502.

Eldon mentioned a very remarkable instance of the uncertainty of this kind of evidence. A deed was produced at a trial on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon declared that he had never attested a deed in his life.*

In a case in Doctors' Commons the learned judge repudiated the common objection of painting or touching, as a reason for inferring fraud, saying that there could scarcely be a less certain criterion, and peremptorily declined the use of a glass of high powers, said to have been used by the professional witnesses, observing, in substance, that glasses of high powers, however fitly applied to the inspection of *natural* subjects, rather tended to distort and misrepresent than to place *such* objects in their *true* light; especially when used (their ordinary application in the hands of prejudiced persons) to confirm some theory or preconceived opinion.† But it is conceived that this ruling of the learned judge must be ascribed to some peculiarity of jurisdiction or practice connected with *the [*113] ecclesiastical courts, as it is the daily practice of courts of Common Law to admit the artificial aid of glasses and lamps. On a trial for murder an optician showed satisfactorily to the jury the name of the prisoner, scratched in rude letters, on the handle of a razor found in a wood near the scene of the crime.*

The following extract from a learned judgment of Sir John Nicholl embodies many instructive observations upon this kind of evidence: "This Court has often had occasion to observe, that evidence to handwriting is at best, in its own nature, very inconclusive: affirmative, from the exactness with which handwriting may be imitated; and negative, from the dissimilarity which is often discoverable in the handwriting of the same person under different circumstances. Without knowing very precisely the state and condition of the writer at the time, and exercising a very discriminating judgment upon these, persons deposing, especially, to a mere *signature* not being that of such or such a person, from its dissimilarity—however ascertained or supposed to be—to his usual handwriting, are so likely to err, that negative evidence to a mere subscription, or signature,

* Eagleton *v.* Kingston, 8 Ves. 473.

† Robson *v.* Rocke, 2 Addams, 79.

‡ Reg. *v.* Sawyer, Maidstone Spring Assizes, 1839, *coram* Mr. Justice Littledale.

can seldom, if ever, under ordinary circumstances, avail in proof, against the final authenticity of the instrument to which that subscription, or signature, is attached. But such evidence is peculiarly fallacious, where the dissimilarity relied upon is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position,—as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined,—nay, the materials, as pen, ink, &c. being different at different times,—are [*114] amply sufficient to account *for the same *letters* being made variously at the different times by the same individual. Independent however of anything of this sort, few individuals, it is apprehended, write so uniformly, that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person."*

SECTION 4.

VERIFICATION OF TIME AND DATES.

Amongst the mechanical circumstances which occasionally lead to the detection of forgery and fraud, a discrepancy between the date of a writing and the *anno Domini* watermark in the fabric of the paper is one of the most striking;† but inasmuch as prospective issues of paper, bearing the water-mark of a succeeding year, are occasionally made, this circumstance is not always a safe ground of presumption.‡

The critical examination of the internal contents of written instruments, perhaps of all others, affords the most satisfactory means of disproving their genuineness and authenticity, especially if they profess to be the productions of an anterior age. It is scarcely possible that a forger, however artful in the execution of his design, should be able to frame a spurious composition without betraying its fraudulent origin by some statement or allusion not in harmony with the known character, opinions and feelings of the pretended writer, or

* Robson *v.* Rocke, 2 Addams, 79; and see Rex *v.* Hawkins, The Theory of Presumptive Proof, p. 94.

† Crisp *v.* Walpole, 2 Hagg. 521.

‡ A Commissioner of the Insolvent Debtors' Court sitting at Wakefield in 1836, discovered that the paper he was then using, which had been issued by the government stationer, bore the water-mark of 1837.

with events or circumstances which must have been known to him, or by a reference to *facts, or modes of thought [*115] characteristic of a later or a different age from that to which the writing relates.* Judicial history presents innumerable examples in illustration of the soundness of these principles of judgment, of which the following are not the least interesting and instructive.

A deed was offered in evidence, bearing date the 13th of November in the second and third years of the reign of Philip and Mary, in which they were called "king and queen of Spain and both Sicilies, and dukes of Burgundy, Milan and Brabant," whereas at that time they were formally styled "*princes* of Spain and Sicily," and Burgundy was never put before Milan, and they did not assume the title of king and queen of Spain and the two Sicilies until Trinity Term following.†

Alexander Humphreys was tried before the High Court of Justiciary at Edinburgh, April 1839, for forging and uttering several documents in support of a claim advanced by him to the earldom of Stirling and extensive estates. One of those documents purported to be an excerpt from a charter of Novodamus of King Charles the First, bearing date the 7th of December 1639, in favour of William the first Earl of Stirling, and making the honors and estates of that nobleman, which under previous grants were inheritable only by heirs *male*, descendable in default of heirs male to his heirs *general*. The excerpt purported in the testatum clause to be witnessed by Archbishop Spottiswood "our chancellor," whereas he died on the 26th of November 1639, and it was proved by the register of the Privy Council that he resigned the office of chancellor, and that the Great Seal was delivered to the custody of James Marquess of Hamilton on the 13th of November 1638, and that there was an *interregnum in the office of chancellor until the appoint- [*116] ment of Lord Loudon on the 30th of September 1641.
A genuine charter, dated four days after the pretended charter, was witnessed by James Marquess of Hamilton.‡ In the margin of the

* Norton's Evid. of the Gen. of the Gosp. i. 52. Greenleaf's Ex. of the Test. of the Evan. § 29. Lockhart's Mem. of Scott, ii. 207.

† Mossam *v.* Ivy, 10 St. Tr. 616 ; and *vide* Coke's First Inst. 7 b.

‡ It is a singular circumstance that in the catalogue of the Scottish chancellors, appended to Spottiswood's History and other works, no mention is made of the interval between the resignation of the archbishop of St. Andrew's and the appointment of the Earl of Loudon.

excerpt was a reference to the register of the Great Seal Book 57, in the following form, "Reg. Mag. Sig. lib. 57;" but it was proved that that mode of marking and reference did not commence until 1806, when the registers were rebound, in order that they should have but one title; and that previously to that time the title of those documents was, "Charters, book i., book ii.", and so on. In the supposed excerpt the son of the first earl was styled "nostro consanguineo," a mode of address never adopted in old charters in regard to a commoner; and there were other internal incongruities. A series of anachronisms conclusively disproved the authenticity of several other documents adduced by the prisoner in support of his claim. One of these documents was a copperplate map of Canada by Guillaume de L'Isle "Premier Géographe du Roi," bearing the date of 1703; and on the back of which, amongst other supposed attestations, were a note purporting to be in the handwriting of Flechier bishop of Nismes, dated the 3d day of June 1707, and another note purporting to be in the handwriting of Fénélon, archbishop of Cambray, of the date of the 16th of October 1707. It was proved that Flechier died in 1711, and the letters patent for the installation of his successor in the bishopric of Nismes, were produced bearing date the 26th of February in that year; that Fénélon died on the 7th of January 1715; and that De L'Isle was not appointed geographer to the king until the 24th of August
[*117] 1718. *In all of De L'Isle's editions of his map the original date of 1703 was preserved as the commencement of his copyright; but of course a map issued prior to 1718 could not refer to his appointment of geographer to the king, and any attestation of the date of 1707 to a map containing a recognition of that appointment must of necessity be spurious. There were other strong grounds for impugning the genuineness of these various documents, which the jury unanimously found to be forged.*

Lord Meadowbank, in his charge to the jury in the foregoing case, mentioned a very remarkable instance of this nature. A tailor in Ayr, of the name of Alexander, having learned that a person of the same name had died, leaving considerable property without any apparent heirs existing, obtained access to a garret in the family mansion; and it was said found there a collection of old letters about the family. These he carried off, and with their aid fabricated a

* See the several Reports of the trial by Archibald Swinton, Esq., and William Turnbull, Esq. Remarks on the trial of the Earl of Stirling, by an English Lawyer.

mass of similar productions, which, it was said, clearly proved his connection with the family of the deceased, and the Lord Ordinary decided the cause in his favour; the case however was carried to the Inner House. When it came into court, certain circumstances led the learned judge, then a young man at the bar, to doubt the authenticity of the documents. One circumstance was this, that there were a number of words in the letters, purporting to be from different individuals, spelt, or rather misspelt, in the same way, and some of them so very peculiar, that on examining them minutely, there was no doubt that they were all written by the same hand. The case attracted the attention of the Inner House.

The party was brought to the clerk's table, and was *ex- [*118]
amined in the presence of the court. He was desired to write to dictation of the Lord Justice Clerk, and he misspelt all the words that were misspelt in the letters in precisely the same way; and this and other circumstances proved that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which he had found in the garret; and what is instructive is this, that this result was arrived at in the teeth of the testimony of half-a-dozen engravers, all saying that they thought the letters were written by different hands.*

It was observed by Lord C. B. Macdonald, that there is nothing we are so little in the habit of, as measuring with any degree of correctness small portions of time; and that if any one were to examine with a watch which marks the seconds, how much longer a space of time a few seconds or a few minutes really are than people in general conceive them to be, they would be surprised; but that in general, when we speak of a minute, or an instant, we can hardly be understood to mean more than that it was a very short space of time†. Nevertheless it is sometimes of the highest importance accurately to fix the exact time of the occurrence of an event, and a difference of a few minutes even may be of vital moment. This frequently happens in cases where the defence is that of an alibi. On a charge of murder, where the defence was of that nature, and it was essential to fix the precise times at which the prisoner had been seen by the several witnesses soon after the fatal event which was the subject of investigation, the object was satisfactorily effected

* *Ibid.*, and see the remarkable case of Smith *v.* Earl Ferrers, published by Pickering, 1846.

† Rex *v.* Patch, Gurney's Report, p. 171.

by a comparison made by an intelligent witness on the same day, of the various time-pieces referred to by the several witnesses, with a public *clock; thus affording the means of reducing the times as spoken to by them to a common standard*.

[*119]

Scientific testimony grounded on the state of wounds and injuries to the human body, or on its condition of decay, is frequently employed indirectly in the solution of questions of time; but cases of this nature belong more appropriately to the department of medical jurisprudence.

* Rex *v.* Thornton, *post*.

*CHAPTER V. [*120]

EXCULPATORY PRESUMPTIONS AND CIRCUMSTANTIAL EVIDENCE.

THE law of England recognizes several presumptions, *juris et de jure*, which create entire or partial exemption from criminal responsibility; as, that infants under the age of seven years cannot be guilty of crime, that infants above that age and under fourteen years shall be *primâ facie* adjudged *doli incapax**, and that, as to certain offences connected with physical development, minors under the age of fourteen years shall be conclusively presumed to be incapable of committing them, and that no evidence shall be admitted to the contrary. Such also is the presumption that, offences committed by the wife in the presence of her husband shall, with certain exceptions, be considered to have been committed by his coercion.† But the presumptions which concern the subject of this essay are of a different kind, consisting mainly of maxims drawn from well-digested experience, and grounded upon considerations of natural equity, for the candid construction of the actions and motives of our fellow-men, and which are in truth but particular forms of strict justice. An enumeration of some of the principal of these presumptions will form the subject of this chapter.

1.) In the investigation and estimate of criminatory evidence there is an antecedent *primâ facie* *presumption [*121] in favour of the innocence of the party accused grounded in reason and justice, not less than in humanity, and recognized in the judicial practice of all civilized nations; which presumptions must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief‡. It must be admitted that in the aggregate, the number of convictions vastly exceeds that of acquittals, and that the probability is that, in a given number of cases, far the greater number of the parties accused are not innocent; but according to all judicial statistics, and under every system, a considerable proportion of the

* 1 Hale's P. C. ch. 3. 4 Bl. Comm. 2. † *Ibid.*

‡ See the language of Lord Gillies in Rex *v.* M'Kinley, 33 St. Tr. 506.

persons put upon trial are legally innocent. In any particular case, therefore, the party *may* not be guilty, and it is impossible, without a violation of every principle of justice, to act upon the contrary presumption of a superior probability of guilt. It is therefore a settled and inviolable principle, that, anterior to contrary proof, the accused shall be considered as legally innocent, and that his case shall receive the same dispassionate and impartial consideration as if he were really so.

2.) It would be foreign to the subject of this essay to discuss the considerations which affect the credibility of evidence in general,—such as the integrity, disinterestedness, and ability of the witnesses, the consistency of their testimony, its conformity with experience, and its agreement with collateral circumstances*,—since these considerations apply to circumstantial only in common with all other testimonial evidence. It is obvious, however, that all reasoning upon the relevancy and effect of circumstantial evidence presupposes its absolute verity, and that such evidence necessarily partakes of the infirmities incidental to all human testimony; and facts apparently indicative of *the most forcible presumption have been fabricated and supported by false testimony. Every consideration therefore, which detracts from the credibility of evidence in the abstract, applies *à fortiori* to evidence which is essentially indirect and inferential. In such cases, falsehood in the minutest particular throws discredit upon every part of a complainant's statement, according to the well-known maxim, *qui mendax in uno mendax in omnibus*. Hence, since facts can never be mutually inconsistent†, circumstantial evidence frequently affords the means of evincing the falsehood of direct and positive affirmative testimony, and even of disproving the existence of the *corpus delicti* itself, by manifesting the incompatibility of that testimony with surrounding and concomitant circumstances, of the reality of which there is no doubt‡. Sir Matthew Hale mentions a very remarkable case, where an elderly man was charged with violating a young girl of fourteen years of age, but it was proved beyond all possibility of doubt, that a physical infirmity rendered the perpetration of such a crime utterly impossible§. The prosecutrix of an indictment against a man for administering arsenic to her, to procure abortion, deposed that he had sent her a present of tarts of which she partook, and

[*122]

* Greenleaf's Ex. *ut supra*, § 29. *et seq.*

† Locke on the Hum. Underst. b. iv. ch. 20. s. 8.

‡ Best on Pres. p. 54. § 1 P. C. c. 58.

that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains, while after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the *prosecutrix afterwards confessed that she had preferred the charge from motives of jealousy.* [*123]

3.) Irrespectively of and distinct from any positive discrepancy, there is a consistency of deportment and conduct grounded upon the invariable laws of our moral nature, which is essentially characteristic of truth and honesty, and the absence of which necessarily detracts from the credit of testimonial evidence. We reasonably expect to discover in the *demeanour* of a party who has just reason to complain of personal injury or violated right, prompt and unequivocal indications of that sense of wrong and insecurity which, as the invariable consequence, is naturally and involuntarily generated in every human mind. Sir Matthew Hale, in reference to one of the greatest of human outrages, says, "If the party concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was supposed to be committed were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned."† These cautionary considerations are applicable with more or less of force to accusations of every description; but they are more especially weighty and pertinent in reference to the particular crime referred to, of which the learned author has said, that "it is an accusation easily to be made, and hardly to be proved, and harder to be defended by the party accused, though never so innocent."‡ Such cases, he further observes, are not uncommon, and he has related the particulars of two cases, where, though the charges were groundless, the parties with difficulty *escaped. "I only mention these instances," said the upright judge, "that we may be the more cautious upon trials of offences of this nature, wherein the court and jury [*124]

* Rex v. Whalley, York Spring Assizes, 1829. Christison on Poisons, p 95.
† 1 Hale's P. C. c. 58. ‡ *Ibid.*

may with so much ease be imposed upon, without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the persons accused thereof by the confident testimony sometimes of malicious and false witnesses."*

4.) Since an action without a motive would be an effect without a cause, a presumption is created in favor of innocence from the absence of all apparent inducement to the commission of the imputed offence. But the investigation of human motives is often a matter of great difficulty, from their latency or remoteness; and experience shows that aggravated crimes are sometimes committed from very slight causes, and occasionally even without any apparent or discoverable motive. This particular presumption would therefore seem to be applicable only to cases where the guilt of the individual is involved in doubt; and the consideration for the jury in general is rather whether upon the other parts of the evidence the party accused has committed the crime, than whether he had any adequate motive.†

5.) The character of a party's motives, even when they are unquestionably of a criminal nature, may nevertheless be susceptible of different interpretations, and indicative of very different degrees of moral and legal turpitude. Concealment of the death of an illegitimate child, or the clandestine disposal of its body, for instance, may be accounted for, either by a purpose to suppress evidence of a murder, or merely by the desire of preserving the repu-
[*125] tation of *female chastity. In all such cases, every sound principle of interpretation and judgment requires, that in the absence of contrary proof, the act shall be referred to the operation of the least guilty motive; conformably to the maxim, *præsumptio judicatur potentior, quæ est benignior.*‡ Of this evident principle of justice the statute 21 Jas. I. c. 27. (now happily expunged from our code), which made the concealment of the death of an illegitimate child by its mother, a conclusive presumption of murder, unless she could make proof by one witness at least, that the child was born dead, was a flagrant violation.

6.) The *primâ facie* presumption in favour of innocence from the absence of all apparent motive, is greatly strengthened, where all

* 1 Hale's P. C. c. 58.

† See Mr. Justice Abbott's charge in Rex *v.* Donnall, *ut supra*, p. 130.

‡ Menoch. De Præs. lib. v. pr. 29.

inducement to the commission of imputed crime is opposed by strong counteracting motives; as where a party indicted for arson with intent to defraud an insurance office has furniture on the premises worth more than the amount of his insurance,* or where a party accused of murder has a direct interest in the continuance of the life of a party supposed to have been murdered.† *A fortiori* would this presumption seem to apply where the life of the suspected party has been endangered, as the consequence of the supposed criminal act; as where a party charged with murder by poisoning had herself partaken of the poisoned food.‡ This candid and just effect has not always been conceded to this circumstance of favourable presumption; but the danger of disregarding it was strikingly manifested in the case of a young woman who was tried at the Old Bailey (April 1815), before the recorder of London, for administering poison to several members of a family in which she lived as cook. *About a fortnight before the event in question, [*126] her mistress had reproved the prisoner for some levity with her husband's apprentices: but in other respects there was no misunderstanding between them; and though she had given her warning, she had afterwards overlooked her indiscretion and continued her in her service. The prisoner made a beefsteak pie and yeast dumplings for dinner, from flour contained in the same vessel. Shortly after partaking of the dumplings, not only her master and mistress, and her master's father, but one of the apprentices and the prisoner herself became extremely ill; while those members of the family who had eaten only of the pie were not affected. The remains left in the pan in which the dumplings had been mixed were scraped together by the father, but not until the following morning, and a white powder was found containing half a teaspoonful of arsenic. Arsenic was kept for killing mice, in a paper marked "deadly poison," in an open drawer accessible to all the family. No analysis was made of the dumplings, and there was no evidence that they *contained* arsenic, and from the large quantity found in the scrapings of the pan, it seems more likely that it had been *poured on* the dumplings. Nor was there any evidence to lead to the inference that the prisoner had eaten of the poisoned food as an artifice to avert suspicion, for she made no attempt to dispose of the remainder of the dumplings, and the dish was left unwashed, and its contents remained

* Rex *v.* Bingham, Horsham Spring Assizes, 1811.

† Rex *v.* Downing, *post.*

‡ Reg *v.* Sarah Hawkins, Stafford Summer Assizes, 1839.

on the following day exactly as they had been brought from the table. No motive was suggested for the commission of so diabolical a crime, except the slight misunderstanding which appeared to have been forgotten on both sides, and which could hardly have presented an inducement to the commission of such a deed. Of the important fact that the prisoner herself had partaken of the poisoned food, and suffered as severely as any one of the other persons who [*127] had partaken of it, no notice *was taken in the Recorder's charge; and there is too much reason, from circumstances which have since transpired, to believe that the unfortunate young woman suffered for the act of another person.*

7.) Since falsehood, concealment, flight, and other like acts, are generally regarded as indications of conscious guilt, it naturally follows, that the absence of these marks of mental emotion, and still more a voluntary surrender to justice, when the party had the opportunity of concealment or flight,† must be considered as leading to the opposite presumption; and these considerations are frequently urged with just effect, as indicative of innocence; but the force of the latter circumstance may be weakened by the consideration that the party has been the object of diligent pursuit.‡ It must be also remembered, that flight and other similar indications of fear may be referable to guilt of another and less penal character than that involved in the particular charge.§

8.) As is the case with other presumptions, so the inference of guilt from the recent possession of stolen property may be rebutted by circumstances which create a counter-presumption; as where the property is found in the prisoner's possession under circumstances which render it more probable that some other person was the thief. Therefore, where, on the trial of a mother and her two sons for sheepstealing, it was proved that the carcase of a sheep was found in the house of the mother, it was nevertheless considered that the presumption arising from the possession of the stolen property immediately after the theft was rebutted so far as respected [*128] her, by the circumstance that **male* footsteps only were found near the spot from which the sheep had been stolen.*

* Rex *v.* Fenning, Sessions Papers, 1815, Best on Pres. p. 289. Mem. of Sir Samuel Romilly, iii. 285.

† Menochius De Præs. lib. v. pr. 50.

‡ Rex *v.* Buish, 1 Syme's Justiciary Rep. 277.

§ Rex *v.* Scofield, 31 St. Tr. 1035.

‖ Rex *v.* Arundel and others 1 Lewin's C. C. 115.

A woman was tried for the larceny of five saws which had been stolen from the workshop of a hat-block turner during the night. There was a hole in the building large enough for a person to have crept in through it. On the following day the prisoner pledged two of the saws with a pawnbroker in the neighbourhood. On the following night, the house of the prosecutor was broken open and a number of articles stolen, and no communication existed between the house and the workshop. Two days afterwards the prisoner was taken into custody for this theft, in the house of a man who was himself charged with having committed the burglary. Mr. Baron Gurney said it was improbable that the female should have taken these saws, but that it was extremely probable that she should have been employed by another person to pawn them, and that it was hardly a case in which the general rule could apply, and that it would be safer to acquit the prisoner.*

9.) Circumstances of apparently unfavourable presumption may be susceptible of an explanation consistent with the prisoner's innocence, and may really be irrelevant to the particular inference sought to be derived from them;† and they may be opposed by circumstances which weaken or neutralize, or even repel the imputed presumption, and induce a stronger counter-presumption,‡ to every allegation of the existence of which justice demands that dispassionate and candid consideration be given. On the trial of a shoemaker for the murder of an aged female, it appeared that his leathern apron had several circular marks made by paring away superficial pieces, which it was supposed *had been [*129] removed as containing spots of blood, but it was satisfactorily proved that the prisoner had cut them off for plasters for a neighbour.§ Two men were tried at Winchester Spring Assizes 1843, for killing a sheep with intent to steal the carcass. The prosecutor had three sheep on the 14th of December on a common, on the evening of which day the prisoners, one of whom had a gun, were seen near the common driving several sheep before them. One of the witnesses, when near the prosecutor's house, heard the report of a gun in the direction of the common, and having a suspicion of the object of the prisoners, went to the prosecutor's house and communicated his suspicion, in consequence of which the prose-

* Rex *v.* Collier, 4 Jurist, 703.

† Rex *v.* Thornton, Rex *v.* Looker, *post.*

‡ Jayne *v.* Price, 5 Taunt. 326.

§ Rex *v.* Fitter, before Mr. Justice Taunton, Warwick Summer Assizes, 1834.

cutor and the witness went to the common on which the sheep had been left feeding and discovered that one of them was not there. The prisoners were apprehended the same night at their respective homes. In the lodgings of one of the prisoners (Courtnage,) a gun was found which had been recently fired; and upon the person of the other prisoner, a knife was found discoloured with blood. No traces however were found of the lost sheep at that time, but the next day the carcass was found, concealed by fern, on the common; the sheep had been shot and also stuck in the neck. Two days afterwards, on searching near the spot where the sheep was found, two small pieces of newspaper were discovered, singed and bearing marks of having been fired from a gun. In the house of the prisoner Courtnage were found a gun and some shot and powder, wrapped in a piece of newspaper, from which two small pieces had been torn; and on comparing the two pieces picked up on the common, they were found to be the identical pieces so torn from the paper in question. Notwithstanding these apparently [*130] conclusive circumstances, the jury acquitted *the prisoner as it appeared from the cross-examination of one of the witnesses that he had seen them shooting on the common on the previous Sunday.* A man was tried for a murder on Horwich Moor, under circumstances which were extremely suspicious; but the presumption against him was greatly weakened, if not entirely destroyed by the circumstance that six shots extracted from the deceased's brain all corresponded in weight with the shot known as No. 3, while the shot in the prisoner's bag contained a mixture of Nos. 2 and 3, and the charge in the gun was found to contain the same mixture.† A druggist's apprentice was tried for the murder by prussic acid of a female servant who was pregnant by him, and the case was one of much suspicion; but there was a strong counter-presumption from the fact that the deceased had made preparations for a miscarriage on the very night in question.‡

Nor must it be overlooked, as one of the sources of error and fallacy in these cases, that circumstances of adverse presumption, apparently the most conclusive, may be fabricated by the real offender, in order to preclude suspicion from attaching to himself, and to cause it to rest upon another; as where a thief transfers marked money

* Rex *v.* Courtnage and Mossingham, *coram* Mr. Sergeant Atcherley.

† Rex *v.* Whittall, Liverpool Spring Assizes, 1839, *coram* Mr. Baron Alderson.

‡ Rex *v.* Freeman, Leicester Spring Assizes, 1839, *coram* Best, L. C. J.; and see Rex *v.* Barnard, 19 St. Tr. 815.

from his own pocket into that of another person,* or surreptitiously puts on the shoes of another person while engaged in the commission of crime, that the impressions may lead to the inference that the crime was committed by a third party.†

*10.) In forming a judgment of criminal intentions, evidence that the party has previously borne a good character is often highly important, if the case is doubtful; and if it hangs in even balance, character should make it preponderate in favour of a defendant.‡ But if the evidence of guilt be complete and convincing, then testimony of previous good character cannot and ought not to avail.§ The reasonable operation of such evidence is to create a presumption that the party was not likely to have committed the act imputed to him; which presumption, however weighty in a doubtful case, cannot but be irrelevant and unavailing against evidence which irrefragably establishes the fact. [*131]

Evidence of character must of course be applicable to the particular nature of the charge; for instance, to prove that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty. The correct mode of inquiry is, as to the *general* character of the accused, and whether the witness thinks him likely to be guilty of the offence which is charged against him.‖

It is not permitted to adduce evidence that the prisoner has not borne a good character, an inquiry which is really irrelevant and calculated to divert attention from the true point to a collateral one, since even if his general character were clearly shown to be bad, he may not have committed the act in question. This principle has been carried so far, that, on an indictment for a particular offence, evidence of an admission by the accused that he was addicted to the commission of similar offences was rejected as irrelevant.¶

*If, however, the presumption arising from the evidence of previous good character be set up by the prisoner, it is then competent to neutralize its effect by counter-evi- [*132]

* Jennings's case, The Theory of Pres. Proof, p. 65; and see the case of Du Moulin, App. to the Life of Eugene Aram.

† The Theory of Pres. Proof, p. 102, and see the remarkable case of François Mayenc, Gabriel, *ut supra*, p. 403.

‡ Per Lord Ellenborough in Rex *v.* Davison, 31 St. Tr. 217.

§ *Ibid.* and Rex *v.* Waigh, 31 St. Tr. 1122.

‖ Per Lord Ellenborough in Rex *v.* Davison, 31 St. Tr. 187.

¶ Rex *v.* Cole, Best on Pres. p. 212.

dence. Thus, where a prisoner was indicted for a highway robbery, and called a witness who deposed to having known him for years, during which time he had borne a good character, it was permitted to ask the witness on cross-examination whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighborhood some years before; Mr. Baron Parke said, that "the question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character," added the learned judge, "is made up of a number of small circumstances, of which his being suspected of misconduct is one."*

As a general rule, neither the prosecutor nor the prisoner can enter into evidence as to *particular facts* of good or bad conduct; but an exception to the rule has been created by statute 6 and 7 William IV. c. 111, which enacts that, "if upon the trial of any person for any subsequent felony, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such prisoner for the previous felony."

11.) Of all kinds of exculpatory defence, that of an *alibi*, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. While the foregoing exculpatory considerations are more or less of an argumentative and inconclusive character, this defence is absolutely incompatible with, and exclusive of, the possibility of the truth of the charge.

[*133] *alibi*, that it should cover the whole of the time of the transaction in question, so as to render it impossible that the prisoner could have committed the act; it is not enough that it renders his guilt improbable merely. A defence of an *alibi* was therefore disregarded, because all that the prisoners offered to prove was that they were in bed on the night in question at 12 o'clock, and were found in bed next morning after the arson with which they were charged had taken place, the distance being two miles, so that they might have risen, committed the deed, and returned to bed.† It is obviously essential to the satisfactory proof of an

The credibility of an *alibi* is greatly strengthened if it be set up at the moment when the accusation is first made, and consistently maintained throughout the subsequent proceedings.‡ On the other

* Rex *v.* Wood, 5 Jurist, 225, and Best on Pres. p. 215.

† Rex *v.* Fraser, Alison's Princ. p. 625.

‡ See a remarkable case of this kind, Rex *v.* Thornton, *post.* p. 141

hand, it is a material circumstance to lessen the weight of a defence of this kind, if it be not resorted to until sometime after the charge has been made; or if, having been once resorted to, a different and inconsistent defence is afterwards set up.

This defence is often entertained with much distrust, because it is easily concocted and frequently resorted to falsely. "It must be admitted," says Sir Michael Foster, "that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but if it appeareth to be founded in truth, it is the best negative evidence that can be offered: it is really positive evidence, which in the nature of things necessarily implieth a negative; and in many cases it is the only evidence which an innocent man can offer*."

The foregoing examples may suffice to illustrate the subject of exculpatory presumptions; but it is obvious, that as inculpatory *facts are infinitely diversified, exculpatory facts [*134] must admit of the same extent of variety, and that they may be of every degree of force. In all such cases of conflicting presumptions, it is the duty of the jury, with the assistance of the court, to weigh and estimate the force of each several circumstance of presumption, and to act upon what appear to be the superior probabilities of the case; and if there be not a decided preponderance of evidence to establish the guilt of the party, to take the safe and merciful course, by abstaining from pronouncing a verdict of guilt, where the necessary light and knowledge to justify them in so doing with the full assurance of moral certainty, have not been vouchsafed.†

* Foster's C. L. p. 368; and see the observations of Mr. Baron George, in Rex *v.* Brennan, 30 St. Tr. 79.

† Mittermaier, *ut supra*, ch. 56.

[*135]

*CHAPTER VI.

RULES OF INDUCTION SPECIALLY APPLICABLE TO CIRCUMSTANTIAL EVIDENCE.

By the process of induction is in strictness meant, the generalizing or classifying facts by observed resemblances and diversities*; or in other words, the operation of discovering and proving general propositions†. It comprehends, in the strictest propriety, every process of reasoning and inference, so that the operation of indirectly ascertaining individual facts in another form of the same proceeding; and every step in a train of reasoning and inference is essentially inductive, whether we are inquiring into a scientific principle, or into an individual fact‡.

It has been observed by a celebrated writer on the science of mind, that "the knowledge of the philosopher differs from that information which is the fruit of common experience, not in kind, but in degree; and that the ultimate object which the philosopher aims at in his researches, is precisely the same with that which every man of plain understanding, however uneducated, has in view, when he remarks the events which fall under his observation, in order to obtain rules for the future regulation of his conduct§." It
[*136] follows, that every branch of philosophical research *involves essentially the same intellectual operations. The rules for estimating the force of arguments and the truth of propositions consequently belong to the province of Logic; and the maxims of evidence are only a selection of logical rules applied to a particular subject-matter‖. Hence, there are scarcely any rules of judgment, perhaps none, which relate exclusively to judicial inquiries founded upon circumstantial evidence; the maxims which specially apply to cases of that kind, being rather in the nature of corollaries from general propositions applicable alike to moral evidence

* Brougham' Nat. Theol. p. 167.

† Mill's Logic, i. 347. ‡ Ib. i. 224.

§ Stewart's El. vol. ii. ch. iv. s. 1; and see Benth. Jud. Ev. book i. ch. i.

‖ Logique Judiciaire, par Hortensius de St. Albin, p. 14. Traité de l'Instruction Criminelle, par Faustin Hélie, t. i. p. 16. Mittermaier, *ut supra*, ch. 57.

of every kind. But inasmuch as the rules which philosophic wisdom and judicial experience and sagacity have recognized as safeguards of truth and justice in general, apply with peculiar pertinency and force to circumstantial evidence, it is necessary briefly to advert to some of the most important of them; and the more especially so, as the transition will be facilitated to other important considerations essentially connected with our subject.

Rule 1.—*The facts alleged as the basis of any legal inference, must be strictly and indubitably connected with the* factum probandum. This rule—intended to guard against fallacies of appearance and generalization*—is an indispensable condition of all sound induction; of which it is the object, by proper rejections and exclusions, and after as many negations as are necessary†, to verify facts and clear them of all ambiguity in their application; so that they may become the premises of logical argument and reasoning. Induction is essentially a process of investigation and elimination. The line of demarcation between conjecture and reality is sometimes so faint and indistinct as to be *imperceptible. In moral investigations the facts are more obscurely developed than when physical phenomena are the subjects of inquiry; and they are frequently blended with foreign and irrelevant circumstances, so that the verification of them, and the establishment of their connection with the *factum probandum*, become matter of considerable difficulty. No weight therefore must be attached to circumstances which, however they may excite conjecture, do not warrant belief. Occurrences may be mysterious and justify even vehement suspicion, and yet the supposed connection between them may be but imaginary, and their co-existence indicative of accidental concurrence merely, and not of mutual correlation. "Where there is nothing but the evidence of circumstances to guide you," said Mr. Justice Bayley, "those circumstances ought to be *closely and necessarily* connected, and to be made as clear as if there were absolute and positive proof‡." Every circumstance therefore which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support, must be rejected from the judicial balance; in other words it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection, either evident and neces- [*137]

* Mill's Logic, vol. ii. book v. ch. 2. and 3.

† Nov. Org. lib. i. Aph. cv.

‡ Rex v. Downing, Salop Summer Assizes, 1822.

sary, or at least so highly probable as to admit of no other reasonable explanation*.

The following cases exemplify the dangerous consequences which may ensue from the disregard of this most salutary cautionary rule.

Two brothers-in-law, Joseph Downing and Samuel Whitehouse, met by appointment to shoot and afterwards to look at an estate, which on the death of Whitehouse's wife without issue
[*138] would devolve on Downing. They arrived *at the place of meeting on horseback, Downing carrying a gun-barrel and leading a colt. After the business of the day, and drinking together some hours, they set out to return home, Downing leading his colt as in the morning. Their way led through a gate opening from the turnpike-road, and thence by a narrow track through a wood. On arriving at the gate Downing discovered that he had forgotten his gun-barrel; and a man who had accompanied them to open the gate went back for it, returning in about three minutes. In the meantime Whitehouse had gone on in advance; and the prisoner, having received his gun-barrel, followed in the same direction. Shortly afterwards Whitehouse was found lying on the ground in the wood, at a part where the track widened, about 600 yards from the gate, with his hat off and insensible, from several wounds in the head; one of which had fractured his skull. While the person by whom he was discovered went for assistance, the deceased had been turned over and robbed of his watch and money. About the same time Downing was seen in advance of the spot where the deceased lay proceeding homeward and leading his colt; and a few minutes afterwards two men were seen following in the same direction. Suspicion attached to Downing, partly from his interest in the estate enjoyed by the deceased, and he was put upon his trial for this supposed murder; but it was clear that he had no motive on that account to kill the deceased, as the estate was not to come to him until after failure of issue of the deceased's wife, to whom he had been married several years, without having had children; so that it was his interest that the way should not be opened to a second marriage. That the deceased had been murdered at all, was a highly improbable conjecture, and it was far more probable that he had fallen from his horse and received a kick, especially as his hat bore
[*139] no marks of injury, so that it had probably fallen off be-

* Mittermaier, *ut supra*, ch. 55, 57.

fore the infliction of the wounds; that the deceased, if murdered at all, had been murdered by the prisoner was in the highest degree improbable, considering how both his hands must have been employed, nor was there any evidence whatever that the deceased had been robbed by the prisoner. It thus appeared, that these accumulated circumstances, of supposed inculpatory presumption, were really irrelevant and unconnected with any *corpus delicti**. The prisoner was acquitted; and it is instructive, that about twelve months afterwards, the mystery of the robbery, the only real circumstance of suspicion, was cleared up. A man was apprehended, upon offering the deceased's watch for sale, and brought to trial for the theft of it and acquitted, the judge thinking that he ought not to be called upon, at so distant a period, to account for the possession of the deceased's property, which he might have purchased from some other person, or otherwise fairly acquired, without being able to prove it by evidence. The accused, when no longer in danger, acknowledged that he had robbed the deceased, whom he had found lying drunk on the road, as he believed; but that he had concealed the watch, on learning that it was supposed that the deceased had been murdered, to prevent suspicion of the murder from attaching to himself.

A farmer was tried under the special commission for Wiltshire, January 1831, upon an indictment which charged him with having feloniously sent a threatening letter, which was alleged to have been written by him. That the letter was in the prisoner's handwriting was positively deposed by witnesses who had had ample means of becoming acquainted with it, while the contrary was as positively deposed on the part of the prisoner by numerous witnesses equally competent to speak to the fact. But the *scale [*140] appears to have turned by the circumstance that the letter in question, and two others of the same kind sent to other persons, together with a scrap of paper found in the prisoner's bureau, had formed one sheet of paper; the ragged edges of the different portions exactly fitting each other, and the water-mark name of the maker, which was divided into three parts, being perfect when the portions of paper were united. The jury found the prisoner guilty, and he was sentenced to be transported for fourteen years. The judge and jury having retired for a few minutes, during their absence the prisoner's son, a youth about eighteen years of age, was

* Rex *v.* Downing, Salop Summer Assizes, 1822, *coram* Mr. Justice Bayley

brought to the table by the prisoner's attorney, and confessed that he had been the writer of the letter in question, and not his father. The son then wrote on a piece of paper from memory a copy of the contents of the anonymous letter, which on comparison left no doubt of the truth of his statement. The writing was not a verbatim copy, although it differed but little; and the bad spelling of the original was repeated in the copy. The original was then handed to him, and on being desired to do so, he copied it, and the writing was exactly alike. Upon the return of the learned judge the circumstances were mentioned to him, and two days afterwards the son was put upon his trial and convicted of the identical offence which had been imputed to the father. It appeared that the son had had access to the bureau, which was commonly left open. The writing of the letter constituted in fact the *corpus delicti;* there having been no other evidence to inculpate the prisoner as the *sender* of the letter, which would however have been the natural and irresistible inference had he been the *writer*. The correspondence of the fragment of paper found in the prisoner's bureau with the letter in question, and with the two others of the same nature sent to other persons, was simply a circumstance of suspicion, but for-
[*141] eign, as it turned out, to the *factum* in *question; and considering that other persons had access to the bureau, its weight even as a circumstance of suspicion seems to have been overrated.*

But perhaps one of the most extraordinary and instructive cases of this kind which have ever occurred, was that of Abraham Thornton, who was tried at Warwick Autumn Assizes 1817, before Mr. Justice Holroyd, for the alleged murder of a young woman, Mary Ashford, who was found dead in a pit of water, about seven o'clock in the morning, with marks of violence about her person and dress; from which it was supposed that she had been violated and afterwards drowned. On the bank of the pit were found the deceased's bonnet and shoes, and a bundle. At the distance of forty yards was found upon the grass the impression of an extended human figure, with blood on the grass near to the centre of the impression, and a large quantity of blood upon the ground near to the lower extremity of the impression; spots of blood were also found in a direction leading from the impression to the pit upon a footpath, and about a foot and a half from the path upon the grass on one side of

* Rex *v.* Isaac Looker, and Rex *v.* Edward Looker, A. R. 1831, p. 9.

it. When the body was found there was no vestige of any footstep on the grass, which was covered with dew not otherwise disturbed than by the blood; from which circumstance it was insisted that the spots of blood on the grass must have fallen from the body of the deceased carried in some person's arms. The prisoner and the deceased had met at a dance on the preceding evening, at a public-house, which they left together about twelve o'clock. About three in the morning they had been seen talking together at a stile near to the spot. About four o'clock in the morning the deceased called at the house of Mrs. Butler at Erdington, where she had left a bundle of clothes on the preceding day; she *ap- [*142]
peared in good health and spirits, changed a part of her dress for some of the garments which she had left there, and quitted the house in about a quarter of an hour. Her way lay across certain fields, one of which adjoined that in which the pit was, and had been newly harrowed. Soon after the discovery of the body, there were found in the harrowed ground the recent marks of the footsteps of the prisoner and the deceased, which, from the length and depth of the steps indicated that there had been running and pursuit, and that the deceased had been overtaken. From that part of the harrowed field where the deceased had been overtaken, her footsteps and those of the prisoner proceeded together in a direction towards the pit and the spot where the impression was found, until the footsteps came within the distance of forty yards from the pit, when, from the hardness of the ground, they could be no longer traced. The mark of a man's running footsteps, not proved however to have been the prisoner's, were also discovered in a direction leading from the pit across the harrowed field; from which it was contended that the accused had run alone in that direction after the commission of the supposed murder. The mark of a man's left shoe (also not proved to have been the prisoner's) was discovered near the edge of the pit, and it was proved that the prisoner had worn right and left shoes. On the prisoner's shirt and breeches were found stains of blood, and he acknowledged that he had had sexual intercourse with the deceased, but alleged that it had taken place with her own consent. The defence was an *alibi*. The deceased, it was proved, was successively seen after leaving Mrs. Butler's house by several persons, proceeding alone in a direction towards her own home, the last of whom saw her within a quarter of an hour afterwards, that is to say before or about half-past four. At about half-past four, and not

later than twenty-five minutes before five, the accused
[*143] was seen by several persons, wholly unacquainted *with
him, walking s lowly and leisurely along a lane leading in an opposite direction from the young woman's course toward his father's house, where he lived. From Mrs. Butler's house to the pit was a distance of upwards of a mile and a quarter, and from the pit to the place where the prisoner was first seen afterwards was a distance of two miles and a half; so that upon the hypothesis of his guilt, he must have rejoined the deceased after she left Mrs. Butler's house, and a distance of upwards of three miles and a quarter must have been traversed, partly by the deceased and partly by the accused, and the pursuit, the criminal intercourse, the drowning, and the deliberate placing of the deceased's bonnet, shoes, and bundle, must have taken place within twenty-five minutes. The defence was set up at the instant of the prisoner's apprehension, which took place within a few hours after the occurrence of the event which formed the subject of the accusation, and was maintained without variation before the coroner's inquest and the committing magistrates, and also upon the trial, and no inroad was made on the credibility of the testimony by which it was supported. The various time-pieces to which the witnesses referred, and which differed much from each other, were carefully compared on the day after the occurrence and reduced to a common standard, so that there could be no doubt of the real times as spoken to by the various witnesses.

It was not too much to assert that it was not within the bounds of possibility that the prisoner could have committed the crime imputed to him; nevertheless public indignation was so strongly excited that his acquittal occasioned great dissatisfaction. There was a total absence of all conclusive evidence of a *corpus delicti*, which the jury were required to infer from circumstances of apparent suspicion. The deceased might have drowned herself, in a moment of bitter
[*144] remorse, after parting from her seducer, *and excited to
agonizing reflection by the sight of so many appalling marks of her ruin. It was possible that she might have sat down to change her dancing-shoes for the boots which she had worn the preceding day and carried in her bundle, and fallen into the water from exhaustion; for she had walked to and from market in the morning, had exerted herself in dancing in the evening, and had been wandering all night in the fields without food. The allegation that the prisoner had violated the deceased, and therefore had a motive to destroy her, was

mere conjecture ; and from the circumstance of her having been out all night with the prisoner, with whom she was previously unacquainted, and from the state of the garments which she took off at Mrs. Butler's, as compared with those for which she exchanged them, it was pretty clear that the sexual intercourse had taken place before she called there, at which time she made no complaint, but appeared composed and cheerful. Again, the inference contended for, from the state of the grass, with drops of blood upon it where the dew had not been disturbed, appeared to be equally groundless and inconclusive ; for there was no proof that the dew had not been deposited after the drops of blood ; and it clearly appeared that the footsteps could not be traced on other parts of the grass where, beyond all doubt, the parties had been together in the course of the night. Now, suppose that the *alibi* had been incapable of satisfactory proof, that the prisoner had not been seen after parting from the deceased, and that the inconclusiveness of the inference drawn from the discovery of drops of blood on the grass, where there were no footmarks had not been manifested from the absence of those marks in other places where the deceased had unquestionably been,—the guilt of the prisoner would probably have been considered indubitable, and his execution been too certain ; and yet these exculpatory circumstances *were entirely casual, collateral, and [*145] independent of the facts which were supposed to be clearly indicative of guilt.*

Rule 2.—*The burthen of proof is always on the party who asserts the existence of any fact which infers legal accountability.*† This is a universal rule of jurisprudence, founded upon evident principles of wisdom and justice ; and it is a necessary consequence, that the affirmant party is not absolved from its obligation because of the difficulty which may attend its application. No man can be justly deprived of his social rights but upon satisfactory proof that he has committed some act which legally involves the forfeiture of them. The law respects the *status in quo*, and regards every man as legally innocent until the contrary be proved. To prove a negative is in most cases difficult, in many impossible. Criminality there-

* The friends of the deceased brought an appeal of death, in which the defendant tendered wager of battle, and the proceedings led to the abolition by St. 59 G. III. c. 48. of that barbarous relic of feudal times; see Ashford *v.* Thornton, 1 B. and Ald. p. 405, and Observations upon the case of Abraham Thornton, by Edward Hollroyd, Esq., containing the judge's notes of the trial.

† 1 Starkie's L. of Ev. 162. 1 Greenleaf's L. of Ev. c. 3.

fore is never to be presumed. But nevertheless the operation of this rule may, to a certain extent, be modified by circumstances which create a counter obligation, and shift the *onus probandi*. It follows, from the very nature of circumstantial evidence, that, in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction.* It is therefore a qualification of the rule in question, that in every case the *onus probandi* lies on the person who is interested to support his case by a particular fact, which lies more particularly within his own knowledge, or of which he is supposed to be cognizant. This indeed is not allowed to supply the want of necessary proof,

[*146] *whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.† It has been well observed, that in such case we have something like an admission that the presumption is just.‡ "In drawing an inference or conclusion, regard must always be had," said Mr. Justice Abbot,§ "to the nature of the particular case, and the facility that appears to be afforded either of explanation or of contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that concern the conduct of men, the certainty of mathematical evidence cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn

* Per Mr. Justice Abbott in Rex *v.* Burdett, 4 B. and Ald. 161.

† Per Mr. Justice Holroyd in Rex *v.* Burdett, 4 B. and Ald. 140.

‡ per Mr. Justice Best, *ib.*

§ *Ibid.*

by the unanimous judgment and conscience of twelve men conversant with the affairs and business of life, and who know that when reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers whose habits might be suspected of *leading them to the indulgence of too much subtlety and refinement." [*147] To the same effect Lord Chief Justice Tindal, on a trial for high-treason, said, "that the offence charged against the prisoner must be proved by those who make the charge. The case must depend not upon what proof occurs on the part of the prisoner, except so far as it contradicts or breaks down the evidence given for the Crown. It is not however an unreasonable thing, and it daily occurs in all investigations, both civil and criminal, that if there is a certain appearance of suspicion made out, which involves a party in a considerable state of suspicion, he should, for his own sake and safety, state what the circumstances were, if possible to reconcile the suspicious appearances with perfect innocence.*

It is a necessary consequence of this rule, rather than a substantive rule, that the *corpus delicti* must be clearly proved before any effect is attached to circumstances supposed to be inculpatory of a particular individual; but this is a branch of the subject of so much importance and of such comprehensive extent, as to require consideration in a separate chapter.

Rule 3.—*In all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits.* The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence when he has it in his power to produce it; of which some interesting exemplifications appear in other parts of this Essay.† This rule applies *a fortiori* to circumstantial evidence, a kind of proof which, for reasons which have been *already urged, is inherently inferior to direct and positive testimony; and therefore whenever such evidence is capable of being adduced, the very attempt to substitute a description of evidence not of the same degree of force, necessarily creates a suspicion that it is withheld from corrupt and sinister motives.‡ Nor is the application of the rule confined to the proof of [*148]

* Reg *v.* Frost, Monmouth Special Commission, January 1840; and see the language of Lord Ellenborough in Rex *v.* Despard, 28 St. Tr. 521; and in Rex *v.* Watson, 32 *ib.* 583; and that of Le Blanc J. in Rex *v.* Mellor and others, 31 St. Tr. 1032.

† See *ante*, ch. iii. s. 7.

‡ See *ante*, p. 31.

the principal fact; it is "the master rule which governs all the subordinate rules,"* and applies alike to the proof of every individual constituent fact, whether principal or subordinate. Thus, where on the trial of a woman for the murder of her brother, a child about eight years of age, by poison, the sexton proved the interment on the 29th of June, and the exhumation on the 12th of August following, of a body which he believed to be that of the deceased, from the coffin-plate, and from the place from which he had exhumed it, but not having seen the body in the coffin at the time of burial, he could not recognize it, independently of these circumstances, on account of its state of decay, the learned judge refused to receive evidence of the contents of the coffin-plate, on the ground that being removable it ought to have been produced, and there being no other evidence of identity he stopped the case.†

Considering the inherent infirmity of human memory, in the fair construction and application of this rule, evidence ought in all criminal cases, and *a fortiori* in cases of circumstantial evidence, to be received with distrust, wherever any considerable time has elapsed since the commission of the alleged offence. The justice and efficacy of punishment, and more especially of capital punishment, inflicted after the lapse of any considerable interval, at least [*149] where the offender has not withdrawn himself from *the reach of justice, are more than questionable.‡ An unavoidable consequence of great delay is, that the party is deprived of the means of vindicating his innocence, or of proving the attendant circumstances of extenuation; the crime itself becomes forgotten, or is remembered but as matter of tradition, and the offender may have become a different moral being: in such circumstances punishment can seldom, perhaps never, be efficacious for the purpose of example. On these accounts judges and juries are always reluctant to convict parties charged with offences committed long previously.§

Rule 4.—*In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that*

* Burke's works, *ut supra*, ii. 618. Mittermaier, *ut supra*, ch. 57.

† Reg. *v.* Edge, Chester Sp. Ass. 1842, *coram* Mr. Baron Maule.

‡ See Rex *v.* Horne, executed at Nottingham in 1759, for the murder of his natural child forty years before; 4 Cel. Trials, 396; and Rex *v.* Wall, 28 St. Tr. 51.

§ Rex *v.* Clewes *ut supra*; and see Rex *v.* Roper, tried at Leicester summer assizes, 1836, for a murder committed thirty-four years before, A. R. 1836.

of his guilt. This is the fundamental rule, the *experimentum crucis* by which the relevancy and effect of circumstantial evidence must be estimated. The awards of penal law can be justified only when the strength of our convictions is equivalent to moral certainty; which, as we have seen, is that state of the judgment, grounded upon an adequate amount of appropriate evidence, which induces a man of sound mind to act without hesitation in the most important concerns of human life. In cases of direct credible evidence, that degree of assurance immediately and necessarily ensues; but in estimating the effect of circumstantial evidence, there is of necessity an ulterior intellectual process of inference which constitutes an essential element of moral certainty. *The [*150] most important part of the inductive process, especially in moral inquiries, is the correct exercise of the judgment in drawing the proper inference from the known to the unknown, from the facts proved to the *factum probandum.* A number of secondary facts of an inculpatory moral aspect being given, the problem is, to discover their causal moral source, not by arbitrary assumption, but by the application of the principles of experience in relation to the immutable laws of human nature and conduct. It is not enough, however, that a particular hypothesis will explain all the phenomena; nothing must be inferred because, if true, it would account for the facts;* and if the circumstances are equally capable of solution upon any other reasonable hypothesis, it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty; and they must therefore be discarded as conclusive presumptions of guilt. Every other possible supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case, can the conclusion of guilt be legitimately adopted.† In strict conformity with these sound principles of reasoning and inference, Lord Chief Baron Macdonald said, that the nature of circumstantial evidence was this, that the jury must be satisfied that there is no rational mode of accounting for the circumstances, but upon the supposition that the prisoner is guilty;‡ and Mr. Baron Alderson in another case, with more complete exactness, said, that to enable the

* Théorie Analytique des Probabilities par Laplace, Introduction, cxxx. 2. Brougham's Nat. Theol. p. 164.

† See Mittermaier, *ut supra*, ch. 59.

‡ Rex *v.* Patch, Surrey spring assizes, 1805.

jury to bring in a verdict of guilty, it was necessary, not
[*151] only that it should be a rational conviction, *but that it should be the only rational conviction which those circumstances would enable them to draw.* If the hypothesis fulfills all the required conditions, then the conclusion is no longer a gratuitous assumption, but becomes as it were incorporated with and part of the induction; and thus an additional test is obtained, by which, as by the application of a theorem of verification, the conclusion may be tested, and if true corroborated and confirmed. Assuming the truth of the conclusion, the previous method of proceeding may be reversed, and we can reason from cause to effect.† The conclusion, if it be true, will of necessity harmonize with, and satisfactorily account for, all the facts, to the exclusion of every other reasonable hypothesis. In the investigation of physical phenomena, no injurious consequence ensues, if an erroneous conclusion be formed as to their mutual connecting relations; whereas in moral investigation, the discovery of a casual antecedent constitutes the substantive matter of inquiry, and erroneous conclusions may be fatally dangerous.‡

In the application of this rule, it is essential that not only the verity of the facts, but their alleged mutual relations, should be submitted to the most rigorous scrutiny; and that every possible objection to the correctness and relevancy of the alleged inferences from them should be boldly advanced and fearlessly discussed. It was profoundly remarked by Milton, that a man may be a heretic in the truth. "Things," says Bacon, "all have their first or second agitation; if they be not tossed upon the arguments of counsel, they will be tossed upon the waves of fortune." No one can witness the proceedings of our superior courts of criminal jurisdic-
[*152] tion without being struck with the anxious *desire to do justice which is conspicuous in all their proceedings, and the almost invariable correctness of their determinations. An Englishman may apply to them with becoming pride the eulogium pronounced by a distinguished foreign lawyer, who declares that our higher courts of *civil* judicature "generally, and with rare exceptions, present the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their de-

* Rex v. Hodges, 2 Lewin's C. C. 227.

† Stewart's El. ii. 346.

‡ Brougham's Nat. Theol. *ut supra*. Stewart's El. vol. ii. ch. 1, 2 and 4.

crees*." But it was a great blot upon our legal system that, prior to the Statute 6 and 7 William IV. c. 114, persons accused of offences of a higher degree than misdemeanours, with the exception of the particular crime of treason, were permitted only the partial assistance of counsel, who could not address the jury upon the facts and substantial merits of the case, however complicated, or however penal in their consequences. It may assuredly be affirmed that the ends of public justice, not less than the safety of individuals, have been greatly promoted by the change.

Another great improvement has been introduced into our criminal jurisprudence by the late Statute 11 and 12 Victoria, c. 78, which creates a court of appeal for the decision of difficult questions of law arising in any court of oyer and terminer and general gaol-delivery or court of quarter sessions; but it yet remains a reproachful anomaly, that there is no legal mode by which the verdict of a jury in criminal cases can be reviewed and a new trial awarded, even in the most palpable case of error. It is impossible to acknowledge too strongly the anxious attention which the Judges give to investigations of this nature, and the readiness with which they, as well as the public functionaries whose duty it is to advise the Crown in matters of this kind, in the last resort, are disposed to attend, even after verdict, to well-considered and credibly attested objections. *But the concurrence of the Judges in the previous proceedings, the claims of public security, the dangers of mistaken tenderness, and of giving countenance to distrust of the tribunals,—these and other considerations render the revision of the deliberate verdict of a jury by the present extra-judicial, anomalous, and ill-adapted course of proceeding, a duty of the most delicate and perplexing nature. [*153]

Rule 5.—*If there be any reasonable doubt, as to the reality of the connection of the circumstances of evidence with the* factum probandum, *or as to the completeness of the proof of the* corpus delicti, *or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than in convicting; or, as the maxim is more popularly expressed, it is better that ten guilty persons should escape, rather than one innocent man should suffer.* This rule follows irresistibly as a deduction from the consideration of the numerous fallacies necessarily incidental to the formation of the judgment on indirect evidence and contingent probabilities, and from the im-

* Kent's Comm. on American Law. i. 497.

possibility in all cases of drawing the line between moral certainty and doubt*. In questions of civil right the magistrate is obliged to decide according to the greatest amount of probability in favour of one or other of the litigant parties; but where life or liberty are in the balance, it is neither just nor necessary that the accused should be convicted but upon conclusive evidence. While it is certain that circumstantial evidence is frequently most convincing and satisfactory, it must never be forgotten, as was remarked by that wise and upright magistrate, Sir Matthew Hale, that "persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt†;" wherefore, as he justly concludes, "this kind of evidence must be very warily pressed." Many adverse appearances may *be outweighed by a single favourable one, and all the probabilities of the case may not be before the court. Paley controverts the maxim, and urges that "he who falls by a mistaken sentence may be considered as falling for his country, while he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld†." There is no judicial enormity which may not be palliated or justified under colour of this execrable doctrine, which is calculated to confound all moral and legal distinctions; its sophistry, absurdity, and injustice have been unanswerably exposed by one of the ablest of lawyers and most upright of men‡. An erroneous sentence is calculated to produce incalculable and irreparable mischief to individuals, to destroy all confidence in the justice and integrity of the tribunals, and to introduce an alarming train of social evils as the inevitable result. No rule of procedure is more clearly and firmly established, as one of the great safeguards of truth, than the rule in question; and it is the invariable practice of judges to advise juries to acquit, whenever they entertain any fair and reasonable doubt. The doubt however must be not a trivial one, such as speculative ingenuity may raise, but a conscientious one which may operate upon the mind of a rational man acquainted with the affairs of life§.

[*154]

It would have been easy to extend this essay by a multiplication of rules; but it will be found that other rules areredundant, or sub-

* Bonnier, *ut supra*, p. 604. † 2 P. C. ch. 39.

† Mor. and Pol. Phil. b. vi. ch. 9.

‡ Romilly's Obs. on the C. L. of England, p. 72. Best on Pres. p. 292.

§ Per Mr. Baron Parke in Reg. *v.* Tawell, *ut supra*.

stantially comprehended under those which have been given; and there is little reason to doubt that, faithfully and judiciously applied, they will lead to conclusions which will seldom or never be found erroneous. *It is in fact from the practical dis- [*155] regard of those rules, rather than from the nature of the subject, that have proceeded those lamentable failures and violations of justice, which have occasionally disgraced the pages of judicial history.

[*156]

*CHAPTER VII.

PROOF OF THE CORPUS DELICTI.

SECTION 1.

GENERAL DOCTRINE AS TO THE PROOF OF THE CORPUS DELICTI.

EVERY allegation of the commission of legal crime involves the establishment of two distinct propositions; namely, that an act has been committed from which legal responsibility arises, and that the guilt of such act attaches to a particular individual.

Such a complication of difficulties occasionally attends the proof of crime, and so many cases have occurred of convictions for alleged offences which have never existed, that it is a fundamental and inflexible rule of legal procedure, of universal obligation, to require satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistible grounds of presumption*, before it is permitted to adduce evidence tending to implicate any particular individual. If it be objected that rigorous proof of the *corpus delicti* is sometimes unattainable, and that the effect of exacting it must be, that crimes will occasionally pass unpunished, it must be admitted that such may possibly be the result; but, it is answered that, where there is no proof, or, which is the same thing, no sufficient
[*157] legal proof of crime, there can be no legal *criminality. In penal jurisprudence there can be no middle term; the party must be absolutely and unconditionally guilty or not guilty. Nor under any circumstances can considerations of supposed expediency ever supersede the immutable obligations of justice; and occasional impunity of crime is an evil of far less magnitude than the punishment of the innocent. Such considerations of mistaken policy led some of the writers on the civil and canon laws to modify their rules of evidence, according to the difficulties of proof incidental to particular crimes, and to adopt the execrable maxim, that the more atrocious was the offence, the slighter was the proof necessary;

* Rex *v.* Burdett, 4 B. and Ald. 123.

in atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi. Such indeed is the logic and inevitable consequence, when, from whatever motive, the plea of expediency is permitted to influence judicial integrity. The clearest principles of justice require, that whatever the nature of the crime, the amount and intensity of the proof shall in all cases be such as to produce the full assurance of moral certainty. Lord Chancellor Nottingham, on the trial of Lord Cornwallis, said, "The fouler the crime is, the clearer and the plainer ought the proof to be*." "The more flagrant the crime is," said Mr. Baron Legge, "the more clearly and satisfactorily you will expect that it shall be made out to you†." Mr. Justice Holroyd said, that "the greater the crime the stronger is the proof required for conviction‡." In another case Mr. Justice Bayley, in even stronger terms, told the jury that, "in proportion to the heinousness and malignity of the offence, there ought to be a reasonable degree of certainty in the proof, and that where there is nothing but the evidence of circumstances, those circumstances ought to be closely and necessarily *connected, [*158] and to be made out as clear as if there were absolute and positive proof§."

SECTION 2.

PROOF OF THE CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE.

But it is clearly established, that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence, and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present or admit, or society must be broken up. Nor is it very often that adequate evidence is not afforded by the attendant and surrounding facts, to remove all mystery, and to afford such a reasonable degree of certainty as men are daily accustomed to regard as sufficient in the most important concerns of life: to expect more would be equally

* 7 St. Tr. 149, and see Rex v. Crossley, 26 St. Tr. 218.
† Rex v. Blandy, 18 St. Tr. 1186.
‡ Rex v. Hobson, 1 Lewin's C. C. 261.
§ Rex v. Downing, Salop Summer Assizes, 1822.

needless and absurd. In Burdett's case* this subject underwent much discussion, and was elaborately treated by the Bench. Mr. Justice Best said, "When one or more things are proved from which experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between
[*159] *the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilized countries. There is scarcely a criminal case from the highest down to the lowest in which courts of justice do not act upon this principle." His Lordship added, "It therefore appears to me quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is intended to be raised as to the *corpus delicti*, that it ought to be strong and cogent." Mr. Justice Holroyd said, "No man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused: and the well-being and security of society much depend upon the receiving and giving due effect to such proof. The presumptions arising from those proofs should no doubt, and most especially in cases of great magnitnde, be duly and correctly weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence."

* 4 B. and Ald. 121.

Mr. Justice Bayley said, "No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one-half *of the persons convicted of crimes, are convicted [*160] on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so in other criminal cases; but the question always is, whether there are sufficient premises to warrant the conclusion." Lord Chief Justice Abbott said, "A fact must not be inferred without premises which will warrant the inference; but if no fact could be thus ascertained by inference in a court of law, very few offences would be brought to punishment. In a great proportion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredient poured into the cup." The law on this point was also very emphatically declared by Mr. Baron Parke in Tawell's case. His Lordship said, "The jury had been properly told by the counsel for the prosecution, that circumstantial evidence is the only evidence which can in cases of this kind lead to discovery. There is no way of investigating them except by the use of circumstantial evidence; but Providence has so ordered the affairs of men that it most frequently happens that great crimes committed in secret leave behind them some traces, or are accompanied by some circumstances which lead to the discovery and punishment of the offender;* therefore the law has wisely provided that you need not have, in cases of this kind, direct proof, *that is, the proof of eye-wit- [*161] nesses, who see the fact and can depose to it upon their oaths. It is impossible, however, not to say that is the best proof, if that proof is offered to you upon the testimony of men whose veracity you have no reason to doubt; but on the other hand it is equally true with regard to circumstantial evidence, that the circumstances may often be so clearly proved, so closely connected with it,

* "Ces circonstances sont autant de témoins muets, que la Providence semble avoir placés autour du crime, pour fair jaillir la lumière de l'ombre dans laquelle l'argent s'est efforcé d' ensevelir le fait principal; elles sont comme un fanal qui éclaire l'esprit du juge, et le dirige vers des traces certains, qu'il suffit de suivre pour atteindre à la verité."—Mittermaier, *ut supra*, ch. 53.

or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye-witnesses. This being a case of circumstantial evidence, I advise you," said the learned judge, "as I invariably advise juries, to act upon a rule, that you are first to consider what facts are clearly, distinctly, indisputably proved to your satisfaction; and you are to consider whether those facts are consistent with any other rational supposition than that the prisoner is guilty of that offence. If you think that the facts in this case are all consistent with the supposition that the prisoner is guilty, and can offer no resistence to that, except the character the prisoner has borne, and except the supposition that no man would be guilty of so atrocious a crime as that laid to the charge of the prisoner, that cannot much influence your minds; for we all know that crimes are committed, and therefore the existence of the crime is no inconsistency with the other circumstances, if those circumstances lead to that result. The point for you to consider is, whether attending to the evidence, you can reconcile the circumstances adduced in the evidence with any other supposition than that he has been guilty of the offence? If you cannot, it is your bounden duty to find him guilty; if you can, then you will give him the benefit of such a supposition. All that can be required is,—not absolute, positive proof —but such proof as convinces you that the crime has been made out*."

[*162]

*SECTION 3.

APPLICATION OF THE DOCTRINE TO CASES OF HOMICIDE.

The same general principles of evidence prevail, with respect to the proof of crimes of every description, and of every element of the *corpus delicti;* and they are so important in reference to circumstantial evidence, that it will be expedient to illustrate their application at some length; and for the sake of brevity and simplicity, the exemplifications will be borrowed from cases of homicide, which are commonly those of the greatest difficulty and interest.

1.) The discovery of the body necessarily affords the best evidence of the fact of death, and of the identity of the individual, and most frequently also of the cause of death.† A conviction for murder is therefore never allowed to take place, unless the body has

* Reg *v.* Tawell, *ut supra.*

† Mittermaier, *ut supra*, ch. 24.

been found, or there is equivalent proof of death by circumstantial evidence leading directly to that result,* and many cases have shown the danger of a contrary practice. Three persons were executed in the year 1660, for the murder of a person who had suddenly disappeared, but about two years after re-appeared. The deceased had been out to collect his mistress's rents, and had been robbed by highwaymen, who put him on board a ship which was captured by Turkish pirates, by whom he was sold into slavery†. Sir Matthew Hale mentions a case where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed the body to ashes in an oven, whereupon B. was indicted of murder, and convicted, and executed; and within one year afterwards A. returned, having been sent beyond sea by B. against his will; "and so," that learned writer adds, "though B. justly deserved death, yet *he was really not guilty of [*162] that offence for which he suffered.‡" Sir Edward Coke also gives the case of a man who was executed for the murder of his niece, who was afterwards found to be living, of which the particulars have been given in a former part of this Essay.§ Sir Matthew Hale, on account of these cases, says, "I will never convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body found.‖" The judicial history of all nations, in all times, abounds with similar warnings and exemplifications of the danger of neglecting these salutary cautions.¶

But, nevertheless, to require the discovery of the body in all cases would be unreasonable and lead to absurdity and injustice, and is indeed frequently rendered impossible by the act of the offender himself. The fact of death may therefore be inferred from such strong and unequivocal circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt; as where on the trial of a mariner for the murder of his captain at sea, a witness stated that the prisoner had proposed to kill him, and that being alarmed in the night by a violent noise, he went upon deck and saw the prisoner throw the captain overboard, and that he was not seen or heard of afterwards, and that near the place on the deck where

* Per Mr. Baron Parke, in Reg *v.* Tawell, *ut supra.*

† Rex *v.* Perrys, 14 St. Tr. 1312.

‡ 2 Hale's P. C. c. 39.

§ See *ante*, p. 52; and for other cases of the same kind, see Green's case, 14 St. Tr. 1311; and Mile's case, Theory of Pres. Proof, App. case 5.

‖ P. C. ch. 40.

¶ See the case of the two Boorns, 1 Greenleaf's L. of Ev. § 214, and *ante*, p. 63.

the captain was, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood. It was urged that, as there were many vessels near the place where the transaction was alleged to have occurred, the probability was [*164] that the party had been taken up by some of them *and was then alive; but the Court, though it admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before the body was cast into the sea, and the jury being of that opinion, the prisoner was convicted and executed.*

2.) It is another necessary step in the establishment of the *corpus delicti* in cases of homicide, that the body, when discovered, be satisfactorily identified. Mr. Justice Park stopped the trial of a woman charged with the murder of her illegitimate child, because the supposed body was nothing but a mass of corruption, so that there were no lineaments of the human face, and it was impossible even to distinguish its sex.† On the trial of a girl for the murder of her child, it appeared that she was proceeding from Bristol to Llandago, and was seen near Tintern at six o'clock in the evening, with the child in her arms, and that she arrived at Llandago between eight and nine without it, and that the body of a child was afterwards found in the river Wye near Tintern, but which appeared from circumstances not to be the prisoner's child; Lord Abinger held that the prisoner could not be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead; the jury were not sitting, he said, to inquire what the prisoner had done with her child, which might be then alive and well.‡

But, nevertheless, it is not necessary that the remains should be identified by direct and positive evidence; where that is impracticable, and especially if it has been rendered so by the act of the party accused, it is sufficient if the identity be established by circumstantial evidence which leaves no reasonable doubt of [*165] the fact. A man was tried for the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning; the effluvium and other circumstances alarmed the neighbours. A

* Rex *v.* Hindmarsh, 2 Leach's C. C. 571.

† See Mr. Justice Park's charge to the grand jury in Rex *v.* Thurtell, Hertford winter assizes, 1824; Reg. *v.* Edge, *ante*, p. 148.

‡ Reg. *v.* Hopkins, 8 C. and P. 591.

portion of the body remained unconsumed, sufficient to prove that it was that of a male adult; and various articles which had belonged to the deceased were found on the person of the prisoner, who was apprehended putting off from the Black Rock at Liverpool, after having ineffectually endeavoured to elude justice by drowning himself. The prisoner was convicted and executed.* The remains of a man which had lain undiscovered upwards of twenty-three years, were identified by his surviving widow from peculiarities in the teeth and skull, and from a carpenter's rule found with them.† Identification has been facilitated by the preservation of the head and other parts in spirits;‡ by the anti-putrescent action of the very substances used to destroy life;§ by the similarity of the undigested remains of food found in the stomach, with the food which it has been known that the party has eaten;‖ by the correspondence of fragments of garments found with the remains and belonging to the deceased,¶—and by many other mechanical coincidences.

The following is a most satisfactory case of the identification of human remains, by a curious train of circumstantial evidence.

A coachman in a gentleman's service at Putney, was tried at the Central Criminal Court, May 1842, for *the murder of a young woman who passed as his wife, and who, together with a boy of seven or eight years of age, who called her mother, lived for several years in lodgings in London for which the prisoner paid, she maintaining herself by washing. On Wednesday evening the 6th of April, a policeman went to his master's premises to apprehend the prisoner on a charge of stealing some articles of wearing apparel. While the officer was engaged in searching the stable, he observed the prisoner go to one of the stalls and remove some hay; and upon the officer proceeding to examine the spot, the prisoner rushed out of the stable and locked the door. On continuing the search, the policeman found the trunk of a full-grown middle aged female, from which the head and part of the neck had been cut off by a clean cut; the arms had been taken off at the shoulder, and the legs and thighs at the great trochanter; the flesh had been cut and the bones had been chopped, and there was a

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* Rex. *v.* Cook, Leicester Summer Assizes, 1834.

† Rex *v.* Clewes, Worcester Spring Assizes, 1830, *coram* Mr. Justice Littledale.

‡ Rex *v.* Hayes and others, 3 Par. and F. 73.

§ Rex *v.* Burdock, *post.*

‖ Rex *v.* McDougal, Burnett's C. L. of Scotl. *ut supra*, p. 540.

¶ Rex *v.* Macowan, *ib.* p. 540.

longitudinal cut extending from the sternum to the pubes, and the intestines had been extracted. The blood-vessels were perfectly empty, and from the medical evidence it was probable that the person had been dead four or five days, and that the mutilation had taken place after death. In a stove in the harness room, a considerable quantity of fuel was ready prepared for lighting a fire, and in the ashes of the grate were found the remains of a skull, and other human bones which had been exposed to considerable heat. In the same room was found an axe with marks of blood upon the handle and edges; and in a drawer a knife much stained with blood. There were also found several portions of female garments stained with blood; and a guard with some keys thereon, all of which were identified as having belonged to the deceased. The deceased had never slept out of her lodgings until Easter Sunday, the 3rd of April. Some time previously the prisoner had represented to her landlady that she [*167] was *about to take a place in the country, and on the last-named day she made arrangements for the boy's sleeping at a neighbour's house for the night, stating that she should return on the following morning. The unfortunate woman left her lodgings on the Sunday morning and never returned. She was met near Hammersmith by the prisoner, and in the afternoon they called together at several houses in the vicinity; and in the evening they were seen together near the premises of the prisoner's master, and subsequently near the stable. On Monday the prisoner went to the deceased's lodgings and took away the boy, and in the course of the day pawned some articles of wearing apparel belonging to the deceased, representing that she was gone into service. On Tuesday, the 5th, much smoke and a strong smell were observed to proceed from the chimney of the harness-room. On the morning of Wednesday, the 6th, the prisoner went out with a pony chaise, and took with him several of the garments which had been worn by the deceased on the day on which she left her lodgings, which he gave to a woman towards whom he had indulged an attachment, and who had occasionally slept with him in the harness-room. To this woman the prisoner represented that his wife had been dead five years, and several weeks before the murder had promised to give her some things which had belonged to her. On the evening of the same day (the 6th), after having locked the policeman in the stable, the prisoner went to the deceased's lodgings, which he left again at half-past five on the following morning, the 7th, taking several things with him, which he left at a public house in the Strand, where he passed

by an assumed name. On the same day the prisoner and his paramour went together to the same public-house, and he was heard to tell her in very coarse terms that the deceased would never trouble her any more. The prisoner afterwards wandered about under various disguises, and was *finally apprehended [*168] working as a labourer on the railway near Tunbridge.

It was impossible under these circumstances to doubt the identity of the mutilated remains, thus strangely discovered, and in a place under the prisoner's sole control, within three days after the deceased had been seen alive in his company, and who when she left her lodgings had worn the very garments which so shortly afterwards he gave to his paramour.

3.) In the proof of criminal homicide the true cause of death must be clearly established; and the possibility of reasonably accounting for the event by self-inflicted violence, accident or natural cause, be excluded; and only when it has been irrefragably proved that no other hypothesis will explain all the conditions of the case, and account for all the facts, can it be safely and justly concluded, that it has been caused by intentional injury. But in accordance with the principles which govern the proof of every other element of the *corpus delicti*, it is not necessary that the cause of death should be verified by direct and positive evidence; it is sufficient if it be proved by circumstantial evidence, which produces a moral conviction in the minds of the jury, equivalent to that which is the result of positive and direct evidence*.

Suicide and accident are sometimes artfully suggested and plausibly urged, as the causes of death, where the allegation cannot receive direct contradiction; and where the truth can be ascertained only by a comparison of all the attendant circumstances; some of which, if the defence be false, are commonly found to be irreconcileable with the cause alleged. In such cases, the discrimination of the true cause of death occasionally involves the profoundest considerations of medical and chemical science†. Cases of this *nature demand the exercise of the utmost delibe- [*169] ration and care; but they properly fall within the sphere of general jurisprudence, to which scientific testimony, like every other kind of evidence, is only subsidiary. The following cases supply interesting illustrations of the way in which such defences are

* See the language of Lord Meadowbank in Reg. *v.* Humphreys, Swinton's Rep. 315.

† See Reg. *v.* Tawell, *post*.

frequently repelled, and shown to be utterly incompatible with the attendant circumstances.

A man was tried at Bury St. Edmund's summer assizes, 1828, for the murder of a young woman, who had borne a child to him, and was taken by him from her father's house under the pretence of conveying her to Ipswich to be married. The prisoner having represented that the parish officers meant to apprehend the deceased, she left her house on the 18th of May in disguise, a bag containing her own clothes having been taken by the prisoner to a barn belonging to his mother, where it was agreed that she should change her dress. The deceased was never heard of afterwards; and the various and contradictory accounts given of her by the prisoner having excited suspicions, which were confirmed by other circumstances, it was ultimately determined to search the barn; where, on the 19th of April, a distance of nearly twelve months, the body of a female was found, which was clearly identified as that of the deceased. A handkerchief was drawn tight round the neck, and a wound from a pistol-ball was traced through the left cheek, passing out at the right orbit; and three other wounds were found, all of which had been made by a sharp instrument, and one of which had entered the heart. The prisoner, who in the interval had removed from the neighbourhood, upon his apprehension denied all knowledge of the deceased; but in his defence he admitted the identity of the remains, and alleged that an altercation took place between them at the barn, in consequence of which, and of the violence of temper exhibited by the deceased, he expreased his determination not to marry
[*170] her, *and left the barn; but that immediately afterwards he heard the report of a pistol, and going back found the deceased on the ground apparently dead; and that, alarmed by the situation in which he found himself, he formed the determination of burying the corpse and accounting for her absence as well as he could. But the variety of the means and instruments employed to produce death, some of them unusual with females, in connection with the contradictory statements made by the prisoner to account for the absence of the deceased, entirely discredited the account set up by him. He afterwards made a full confession, and was executed pursuant to his sentence*.

At Durham autumn assizes, 1824, a surgeon was tried for attempting to poison his wife. It was proved that pills containing corrosive

* Rex v. Corder.

sublimate, and compounded by the prisoner, were given by him to her instead of pills of calomel and opium, which had been ordered by her physician; but he alleged that, being intoxicated, he had mistaken for the shop-bottle containing opium the corrosive sublimate bottle, which stood next it. This was an improbable error, the opium being in powder and the sublimate in crystals. The physician afterwards sent the prisoner to the shop to prepare a laudanum draught, with water for the menstruum; and on his return with it, observing it to be muddy, he was led to taste it before he administered it; and finding it had the taste of corrosive sublimate, he preserved it, analysed it, and discovered that it did contain that poison. The prisoner stated that he had again committed a mistake, and instead of water had accidentally used for the menstruum a corrosive sublimate injection, which he had previously prepared for another patient; but this was proved to have been impossible, since the injection contained only five grains to the ounce, while the *draught, which did not exceed one ounce, contained [*171] fourteen grains*.

James Greenacre was tried before the Central Criminal Court, on the 10th of April 1837, for the murder of a woman whom he was about to marry, and who in the prospect of that event had converted nearly all her goods into money. On the morning of the 24th of December the deceased left her home, stating to a neighbour that she was going to the house of her intended husband at Camberwell, but should return in the evening. On the 28th of December the trunk of a female was found in the Edgeware Road; on the 6th of January a female head was found in the Regent's Canal, and on the 2d of February the legs of a female were found in an ossier-bed at Camberwell; these several parts were clearly ascertained to be parts of the same body, and were identified as the remains of the deceased. Upon his apprehension the prisoner at first denied all knowledge of the deceased; but he subsequently admitted that on the evening of the day on which she left her home she came to his house, and he alleged that they had an altercation in consequence of her duplicity in the statement of her property; that during this conversation the deceased was moving backwards and forwards in her chair, which was on the balance; that he put his foot to the chair, when she fell back with great violence against a block of wood; and that finding life extinct, he made up his mind in the alarm of the moment to conceal

* Rex v. Hodgson, Christison on Poisons, p. 82.

her death, and get rid of her remains, to which effect he had divided and disposed of them in the manner stated. This ingenious fabrication was clearly refuted by the professional witnesses, who proved that a wound in the eye, which had occasioned the escape of the humours and around which there was an ecchymosis, must have been inflicted during life, and deprived the deceased of
[*172] sense for a time ; that it could not *have been occasioned by a blow at the back of the head; and that from the retracted state of the muscles of the neck and the emptied condition of the blood-vessels, her throat must have been cut either before or immediately after death.*

But it is not always that the nature of the injuries, and the attendant circumstances, thus afford the means of concluding with moral certainty, that the allegations of suicide or accident are false, and death has not been occasioned in one or other of those ways. In such cases, scientific evidence, when uncorroborated by conclusive moral circumstances, must be received with much circumspection and reserve; and justice no less than prudence requires that where the guilt of the accused is not conclusively made out, however suspicious his conduct may have been, he shall be acquitted. The following cases exemplify the distinction.

A young man was tried for the murder of his brother. The deceased lived with his father and overlooked his farm. The prisoner, who was on ill terms with the deceased, and lived about twenty miles from his father's house, went to visit his father, and on the day after his arrival the deceased was found dead in the stable, not far from a vicious mare, and her traces were upon his arms and shoulders; two other horses were in the stable, but they had their traces on. Suspicion fell on the prisoner, and the question was, whether he had killed the deceased with a spade, or whether he had been kicked by the mare. The spade was bloody, but it had been inadvertently used in cleaning the stable by a boy; and the nature of the cause of death could only be determined by the character of the wounds. There were two straight incised wounds on the left side of the head, one about five, and the other about two inches long, which had apparently been inflicted by an obtuse instrument.
[*173] *On the right side of the head there were three irregular wounds, (two of them about four inches in length,) partaking of the appearance both of lacerated and incised wounds.

* Sessions Papers, 1337.

There was also a wound on the back part of the head, about two inches and a half long. There was no tumefaction around any of the wounds, the integuments adhering firmly to the bone; and, except where the wounds were inflicted, the fracture of the skull was general throughout the right side, and it extended along the back of the head toward the left side, and a small part of the temporary bone came away. The deceased was found with his hat on, which was bruised but not cut, and there were no wounds on any other part of the body. Two surgeons expressed a strong opinion that the wounds could not have been inflicted by kicks from a horse; grounding that opinion principally on the distinctness of the wounds, the absence of contusion, the firm adherence of the integuments, the straight lateral direction and similarity of the wounds; whereas, as they stated, the deceased would have fallen from the first blow if he had been standing, and if lying down the wounds would have been perpendicular; and they moreover expressed a positive opinion that the wounds could not have been inflicted if the hat had been on the deceased's head without cutting the hat, and that he could not have put on his hat after receiving any of the wounds. The learned Judge, however, stated that he remembered a trial at the Old Bailey, where it had been proved that a cut and fracture had been received, without having cut the hat; and evidence was adduced of the infliction of a similar wound by a kick without cutting the hat. The prisoner was acquitted.*

*A druggist's apprentice was tried for the murder of [*174] his fellow servant, by prussic acid. The deceased was pregnant by the prisoner, and was found one morning dead in bed. A number of circumstances led to the suspicion that the prisoner had been instrumental in the administration of the poison; but it was proved that the deceased had made arrangements for a miscarriage by artificial means on the very night in question; and it was therefore urged on the part of the prisoner, that she had taken the poison of her own accord. It appeared that she had taken prussic acid from a partially emptied phial, which lay corked and wrapped in paper beside her bed, where she was found lying with the bed-clothes drawn up to her chin, and her arms folded across the body. A piece of leather and string, which appeared to have been taken from a bottle, were found in the room. It was considered in the highest

* Warwick Spring Assizes, 1808, (Rex *v.* Booth) *coram* Mr. Baron Wood. It is curious that the prisoner was shortly afterwards executed for forging Bank of England notes.

degree improbable, but was generally admitted by the medical witnesses to have been *possible*, that the deceased might have corked the bottle after taking the dose from which she died; and the prisoner, though his conduct had very deservedly drawn suspicion upon him, was therefore acquitted. The fact is instructive and admonitory, and Professor Christison, (in the later editions of his book on poisons,) with the candour which should ever mark the scientific mind, acknowledges that the concurrence which in the first edition of that work he had expressed in the opinion of the majority of the witnesses, that there could not have been time after swallowing the poison for performing the acts of volition implied in the supposition of suicide was given rather too unreservedly; and he mentions a case of suicide, in which an apothecary's assistant was found dead in bed, with an empty two-ounce phial on each side of the bed; the mattress, which is used in Germany instead of blankets, pulled up as high as the breast, the right arm extended straight down
[*175] beneath the mattress, and the left arm bent *at the elbow ;* and other instances of the same kind have since occurred.

A surgeon was tried at the Central Criminal Court, August 1814, before Mr. Baron Gurney, for the murder of his wife. They left their place of residence at North Sunderland, on a journey of pleasure to London on the 1st of June (having a few days previously made mutual wills in each other's favour), where on the 4th of that month they went into lodgings. The deceased, who was advanced in pregnancy, was slightly indisposed after the journey; but not sufficiently so to prevent her from going about with her husband. On the 8th, being the Saturday morning after their arrival in town, the prisoner rang the bell for some hot water, a tumbler and a spoon; and he and his wife were heard conversing in their chamber about seven o'clock. About a quarter before eight the prisoner called the landlady up stairs, saying that his wife was very ill; and she found her lying motionless on the bed, with her eyes shut and her teeth closed, and foaming at the mouth. On being asked if she was subject to fits, the prisoner said she had had fits before but none like this, and that she would not come out of it. On being pressed to send for a doctor, the prisoner said he was a doctor himself and should have let blood before but that there was no pulse. On being

* Rex *v.* Freeman, Leicester Spring Assizes, 1829, *coram* L. C. J. Best. Christison on Poisons, p. 705. Beck's Medical Jurisp. p. 887.

further pressed to send for a doctor and his friends he assented, adding that she would not come to, that this was an affection of the heart, and that her mother died in the same way nine months ago. The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water, and applied a mustard plaster to her chest. A medical man was sent for, but *before [*176] his arrival the patient had died. There was a tumbler close to the head of the bed, about one-third full of something clear but whiter than water, and there was also an empty tumbler on the other side of the table, and a paper of Epsom salts. In reply to a question from the medical man whether the deceased had taken any medicine that morning, the prisoner stated that she had taken nothing but a little salts. On the same morning the prisoner ordered a grave for interment on the following Monday. In the meantime the contents of the stomach were examined and found to contain prussic acid and Epsom salts. It was deposed that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful sedative poison, and that the means resorted to by the prisoner were not likely to promote recovery; but that cold affusion, artificial respiration, and the application of brandy or ammonia (which in the shape of smelling salts is found in every house), and other stimulants were the appropriate remedies, and might probably have been effectual. No smell of prussic acid had been discovered in the room, though it has a very strong odour, but the window was open, and it was stated that the odour is soon dissipated by a current of air. The prisoner had purchased prussic acid, as also acetate of morphine, on the preceding day, from a vender of medicines with whom he was intimate; but he had been in the habit of using these poisons under advice for a complaint in the stomach. Two days after the fatal event, the prisoner stated to the medical man, who had been called in and who had assisted in the examination of the body, that on the morning in question he was about to take some prussic acid, that on endeavouring to remove the stopper he had some difficulty, and used some force with the handle of a tooth-brush, that in consequence of breaking the neck of the bottle by the force, some of the acid was spilt; that he placed the remainder in the tumbler *on the drawers at the end of the bed-room, [*177] that he went into the front room to fetch a bottle wherein to place the acid, but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream

from his wife's bed-room, calling for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, the prisoner said he had destroyed it; and on being asked why he had not mentioned the circumstances before, he said he had not done so, because he was so distressed and ashamed at the consequences of his negligence. To various persons in the north of England the prisoner wrote false and suspicious accounts of his wife's illness. In one of them, dated from the Euston Hotel on the 6th of June, he stated that his wife was unwell, and that two medical men attended her, and that in consequence he should give up an intended visit to Holland, and intimated his apprehension of a miscarriage. For these statements there was no foundation. At that time moreover he had removed from the Euston Hotel into Lodgings, and on the same day he had made arrangements for leaving his wife in London, and proceeding himself on his visit to Holland. In another letter, dated the 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that he had had his wife removed from the hotel to private lodgings, where she was dangerously ill and attended by two medical men, one of whom had pronounced her heart to be diseased; these representations were equally false. In another letter, dated the 9th of June, but not posted until the 10th, he stated the fact of his wife's death, but without any allusion to the cause; and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach of his negligence. The prisoner's statement [*178] to his landlady that his wife's mother had died *from disease of the heart was also a falsehood; the prisoner having himself stated in writing to the registrar of burials that brain fever was the cause of death. It was however proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms, and that he was extremely careless in his habits; and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition. Upon the whole, though the case was to the last degree suspicious, it was certainly possible that an accident might have taken place in the way suggested; and the jury brought in a verdict of acquittal.

SECTION 4.

APPLICATION OF THE GENERAL PRINCIPLE TO PROOF OF THE CORPUS DELICTI IN CASES OF POISONING.

THERE are two classes of cases of homicide in which the proof of the *cause* of death presents peculiar difficulties; those namely, of poisoning and infanticide. An examination of the principles on which courts of law proceed in the investigation of cases of these descriptions will form an instructive commentary upon the rules of evidence and procedure, which have formed the subject of this and the preceding chapters.

The chief grounds upon which the proof of criminal poisoning generally rests, are the symptoms during life, *post mortem* appearances, chemical tests, and moral conduct.

1, 2.) The first and second of these heads of evidence belong more appropriately to medical jurisprudence; but the diversity of opinion which prevails respecting the sufficiency of such evidence alone, and the consideration that the facts must be submitted to a popular tribunal, acting upon the principles [*179] of common observation and experience, render it expedient briefly to notice the general *result* of those opinions.

Writers on this department of jurisprudence appear to be agreed, that the symptoms and *post mortem* appearances, which are commonly incidental to cases of poisoning, are such as may in general be produced by other causes; and that consequently they can never be considered as affording unequivocal evidence of death from poisoning*; while some authors maintain that the doctrine applies only to the *general* characteristics of the symptoms, and that in some cases of *particular* poisons, as for instance sulphuric, nitric and oxalic acids, arsenic, the compounds of mercury† and some others, the symptoms only may occasionally afford decisive evidence of poisoning; and that in many instances both of acute and chronic poisoning with strong acids, distinct evidence may be procured from the morbid appearances only‡. But it never occurs in practice, that charges of this nature depend upon these elements of proof alone; they are invariably blended with other and more conclusive heads of evidence, so that these points may be considered as in some degree

* Christison on Poisons, p. 27.

† *Ibid.* pp. 165, 207, 308, 402.

‡ *Ibid.* p. 163.

rather of an abstract and theoretical than of a practical character; and this general mention of them is therefore all that is requisite for the purposes of this Essay.

3.) Some foreign writers on medical jurisprudence maintain that poisoning can never be satisfactorily substantiated unless the particular poison be made out* ; but that is a point which it does not fall within the province of medical jurisprudence to determine: it is a mixed question of fact and law, to be settled by the tribunals. Such a doctrine has never been admitted in English jurisprudence, and its recognition would be fraught with danger. Some [*180] *of the vegetable poisons, at least in the present state of chemical science, scarcely admit of that kind of proof† ; and to require it would be to proclaim impunity to offenders skilled in chemistry. A conviction took place in Scotland, where a servant-girl had mixed some poisonous matter with gravy; but the scientific witnesses were unable to discover any poisonous substance, and one of them stated that he was led to suppose that poison had been swallowed, merely from the circumstance of two persons being taken ill nearly at the same time, after partaking of the same food, and with symptoms which various kinds of poison would produce. In answer to a question from the court, he said the probability was greatly strengthened by the fact, that the violence of the symptoms was in proportion to the quantities of the suspected food taken. The prisoner admitted that she had introduced a little powder in sport, which she had obtained from a neighbouring servant, who assured her that it would do no harm, but merely sicken the persons who might partake of it‡.

It was strenuously urged by the counsel for the prisoner in a late case, of great interest, that it was a rule of law, that there should be positive proof of the mode of death, and also that such a quantity of poison was found in the body of the deceased as would necessarily occasion death§. But this doctrine was peremptorily repudiated by Mr. Baron Parke, who told the jury, that "if the evidence satisfied them that the death was occasioned by poison, and that that poison was administered by the prisoner,—if that," said his Lordship, "is proved by circumstantial evidence, it is not necessary to

* *Ibid.* Pref. x. and p. 59.

† Procès de Castaing, Causes Criminelles célèbres du dix-neuvième siècle, t. 8. p. 1.

‡ Rex *v.* Alcorn, 1 Syme's Justiciary Rep. 221.

§ Reg. *v.* Tawell, *post*.

give direct and positive proof what is the quantity which would destroy life, nor *is it necessary to prove that such [*181] a quantity was found in the body of the deceased, if the other facts lead you to the conclusion that the death was occasioned by poison, and that it was knowingly administered by the prisoner. You must take this fact, just the same as all the other parts of the case and see, if you are satisfied as reasonable men whether the prisoner is guilty or not. The only fact which the law requires to be proved by direct and positive evidence is the death of the party, by finding the body; or when such proof is absolutely impossible, by circumstantial evidence leading closely to that result,—as where a body was thrown overboard far from land,—when it is quite enough to prove that fact without producing the body." His Lordship in a subsequent part of his charge also said, "There is very reasonable evidence, supposing that to be required, which I tell you is not, that the quantity of prussic acid in the stomach amounted to one grain; and although that is not necessary to be proved, the scientific evidence shows that one grain may be enough to destroy life." In reference to the argument urged by the prisoner's counsel, that the deceased might have died from some sudden emotion, the learned judge said, that it was within the range of possibility that a person might so die without leaving any trace on the brain; *they* were to judge whether they could attribute death to that cause, if they found strong evidence of the presence of poison; because they were not to have recourse to mere conjecture; that, where the result of the evidence gave them the existence of a cause to which death might be rationally attributed, they were not to *suppose* it was to be attributed to any other cause.

Upon general principles, however, it cannot be doubted that courts of law would require chemical evidence of poisoning, wherever it were attainable; and in that case it would seem but reasonable in analogy to the general *rules of evidence, that [*182] it should be of the highest character which the nature of the case admits: at least a conviction cannot be satisfactory if it be grounded upon evidence of an inferior nature, where evidence of a more satisfactory character is capable of being adduced. In a case before the Court of Justiciary, a physician eminently versed in toxicological science stated that he considered the seven liquid tests for arsenic which had been employed in that case, and which had severally yielded the characteristic appearances of arsenic, to be sufficient evidence taken together, though they were not so singly; and

that he was not acquainted with any other substances which could give the same successive appearances with all the tests; but he added, that it would require a very wide investigation of the whole field of chemistry to say that no other substance would*. The chance of error in such case must be inconceivably small, the sources of fallacy connected with each of the tests being different; but in the case in question metallic arsenic had in fact been reproduced, so that the result did not depend upon the evidence as to the effect and sufficiency of the other tests. The effect of the liquid tests was also much relied upon in the case of a young woman who was convicted, at Warwick autumn assizes, 1831, of the murder of her uncle, a labouring man, whose savings had excited the cupidity of a man to whom she was about to be married. The deceased left his work in the evening in good health; but died in the night, after having supped upon pea-soup. The prisoner had purchased arsenic on the day of her uncle's decease, which she stated that she had purchased to poison mice, pointing to a dead one which however had not been poisoned. The symptoms and *post mortem* appearances were such as would have been produced by an irritant poison. To the contents of the stomach were applied the several tests of the ammo-
[*183] niacal *nitrate of silver, the ammoniacal sulphate of copper, and sulphuretted hydrogen gas; and crystals of white arsenic were obtained by the reduction test. A physician stated that he had seen the liquid tests applied, and that when the result of them applied to the same liquid is uniform, no chemist would doubt the correctness of that result, and that he considered them to be conclusive; since, though the three tests might be separately fallacious, the *sources* of fallacy were different. On cross-examination the witness said there was scarcely any test which had not been said to have been subsequently proved to be fallacious, which however he doubted, but that the test by reduction was certainly not fallacious. The prisoner was convicted and executed, and acknowledged her guilt†.

The following is a leading and remarkably instructive case in reference to the particular question in discussion.

A surgeon and apothecary was tried at Launceston spring assizes, 1817, before Mr. Justice Abbott, for the murder of Mrs. Elizabeth Downing, his mother-in-law. The prisoner and the deceased were next-door neighbours, and lived upon friendly terms; and there was

* Rex v. Elder, 1 Syme's Rep. 71. † Rex v. Higgins.

no suggestion of malice, nor could any motive be assigned which could have induced the prisoner to commit such an act, except that he was in somewhat straightened circumstances, and in the event of his mother-in-law's death would have become entitled to a share of her property. On the 19th of October the deceased drank tea at the prisoner's house, and returned home much indisposed, retching and vomiting, with a violent cramp in her legs, from which she did not recover for several days. On Sunday the 3d of November, after returning from church, she dined at home on boiled rabbits smothered with onions, and, upon the invitation of her daughter, drank tea in the evening at the prisoner's house with a family party. The prisoner handed *to the deceased cocoa and [*184] bread and butter, proceeding towards her chair by a circuitous route; and while she was drinking the second cup she complained of sickness, and went home, where she was seized with retching and vomiting, and attended with frequent cramps; and then a violent purging took place, and at eight o'clock the same morning she died. To a physician called in by the prisoner two or three hours before her death, he stated that she had an attack of *cholera morbus*. The nervous coat of the stomach was found to be partially inflamed or stellated in several places, and the villous coat was softened by the action of some corrosive substance; the blood-vessels of the stomach were turgid, and the intestines, particularly near the stomach, inflamed. The contents of the stomach were placed in a jug, in a room to which the prisoner (to whom at that time no suspicion attached,) had access; and it appeared that he had clandestinely tampered with those contents, by throwing them into another vessel, containing a quantity of water. The prisoner proposed that the body should be interred on the following Wednesday, assigning as a reason for so early an interment, that, from the state of the corpse, there would be danger in keeping it longer. This representation was entirely untrue. He also evinced much eagerness to accelerate the preparations for the funeral, urging the person who had the charge of it, and the men who were employed in making the vault, to unusual exertions. The physician called in to the deceased concluded from the shortness of the illness, and the morbid appearances, that she had died from the effects of some active poison; and in order to discover the particular poison supposed to have been used, he applied to the contents of the stomach the chemical tests of the ammoniacal sulphate of copper or common blue vitriol, and the ammoniacal nitrate of silver or lunar caustic in solution, which severally

yielded the *characteristic appearances of arsenic; the
[*185] ammoniacal sulphate of copper producing a green precipitate, whereas a blue precipitate is formed if no arsenic be present, and the ammoniacal nitrate of silver producing a yellow precipitate, instead of a white precipitate, resulting if arsenic be not present. He stated that he considered these tests infallible, and that he had used them because they would detect a minuter portion of arsenic; on which account he considered it to be more proper for the occasion, as from the appearance of the tests he found there could not be much. Concluding that bile had been taken into the stomach, he mixed some bile with water, and applied some tests, but found no indication of the presence of arsenic; from which he inferred that the presence of bile would not alter the conclusion which he had previously drawn. Having been informed that the deceased had eaten onions, he boiled some in water; and after pouring off the water in which they were boiled, he poured boiling water over them and left them standing for some time, after which he applied the same tests to the solution thus procured, and ascertained that it did not produce the characteristic appearances of arsenic. The witness, upon his cross-examination, admitted that the symptoms and appearances were such as might have been occasioned by some other cause than poisoning; that the reduction test would have been infallible; and that it might have been adopted in the first instance, and might also have been tried upon the matter which had been used for the other experiments. Upon his re-examination he accounted for his omission of the reduction test, by stating, that the quantity of matter left after the frequent vomitings and the other experiments would have been too small, and that it would not have been so correct to use the matter which had been subjected to the
[*186] preceding experiments, and that the tests he used *would detect a more minute quantity of arsenic. It was clear therefore that no sufficient reason existed, why, if arsenic had been contained in the stomach, it had not been reproduced either by an original experiment or by experiments upon the matter to which the other tests had been applied, and that its dilution had not rendered the experiment by reduction impracticable, but only more dilatory and troublesome. It was deposed by several medical witnesses called on the part of the prisoner, that the symptoms and morbid appearances, though they were such as might and did commonly denote poisoning, did not exclude the possibility that death might have been occasioned by *cholera morbus* or some other disease; that the tests

actually resorted to were fallacious, and produced the same characteristic appearances upon their application to innocent matter, namely, the ammoniacal sulphate of copper producing the green, and the ammoniacal nitrate of silver producing the yellow precipitate on being applied to an infusion of onions; and that the experiment with the bile was also fallacious, since, from the presence of phosphoric acid, which is contained in all the fluids of the human body, the same coloured precipitate would be thrown down by putting lunar caustic into a solution of phosphate of soda. It was to no purpose to urge that a decoction of onions was not the same thing as that particular preparation of onions of which the deceased had partaken, and that in the hands of the witness for the prosecution this experiment had been attended with a different result; the facts adduced by the prisoner's witnesses conclusively proved that the appearances produced by the tests employed might have been produced by some other cause than the presence of arsenic, and therefore that they were fallacious and inconclusive, while an infallible test might have been resorted to. Thus every one of the grounds of presumption against the prisoner was successively weakened, if not destroyed; though his conduct had *naturally created impressions unfavourable [*187] to the last degree to the belief of his innocence.*

4.) In all cases of this kind the moral evidence from the *conduct* of the accused—his antipathies or other motives—his possession of the means of death, especially if unexplained by any circumstance to account for it upon an innocent hypothesis—his declarations—his falsehoods, subterfuges and evasions to prevent examination of the body or to induce premature interment—and many other suspicious circumstances, constitute very material parts of the *res gestæ*, and furnish a clue to the explanation of facts which would otherwise be inexplicable. It is perfectly clear that by the law of England all such facts afford competent and relevant evidence, from which may be inferred the criminal administration of poison. Mr. Justice Buller, in Donellan's case, told the jury that, "if there was a doubt upon the evidence of the physical witnesses, they must take into their consideration all the other circumstances either to show that there was poison administered or that there was not, and that every part of the prisoner's conduct was material to be considered."† To the same effect, Mr. Justice Abbott, in Donnall's case, said that "there were

* Rex *v.* Donnall, Frazer's Short-hand Report, *ut supra*.

† Gurney's Short-hand Report, *ut supra*, p. 53.

two important questions: first, did the deceased die of poison, and if they should be of opinion that he did, then, whether they were satisfied from the evidence that the poison was administered by the prisoner or by his means? There were some parts of the evidence which appeared to him equally applicable to both questions, and those parts were what related to the conduct of the prisoner during the time of the opening and inspection of the body; his recommendation of a shell and the early burial; to which might be added the circumstances, not much to be relied upon, relative to
[*188] his endeavours to evade his apprehension."* His *Lordship also said, "If the evidence as to the opinions of the learned persons who have been examined on both sides should lead you to doubt whether you should attribute the death of the deceased to arsenic having been administered to her, or to the disease called *cholera morbus*,—then, as to this question as well as to the other question, the conduct of the prisoner is most material to be taken into consideration; for he being a medical man could not be ignorant of many things as to which ignorance might be shown in other persons: he could hardly be ignorant of the proper mode of treating *cholera morbus;* he could not be ignorant that an early burial was not necessary; and when an operation was to be performed, in order to discover the cause of the death, he should not have shown a backwardness to acquiesce in it; and when it was performing, and he attending, he could not surely be ignorant that it was material for the purposes of the investigation that the contents of the stomach should be preserved for minute examination."† His Lordship also said, "The conduct of the prisoner, his eagerness, in causing the body to be put into a shell, and afterwards to be interred speedily, was a circumstance most material for their consideration, with reference to both the questions he had stated; for although the examination of the body in the way set forth, and the experiments that were made, might not lead to a certain conclusion as to the charge stated, that the deceased got her death by poison administered to her by the prisoner, yet if the prisoner as a medical man had been so wicked as to administer that poison, he must have known that the examination of the body would divulge it."‡

So in Tawell's case, Mr. Baron Parke stated to the jury that, "in considering the question, whether or not death was caused
[*189] *by prussic acid, they were not to abstain from looking at the conduct of the prisoner as a part of that question;

* Frazer's Short-hand Report, *ut supra*, p. 127. † *Ib.* 161. ‡ *Ib.* 170.

that they must look at all the circumstances in the case, and see whether the prisoner's conduct, and the thing that was in his possession, would not strengthen them in the conclusion, that the scientific witnesses had properly arrived at the conclusion, that beyond all doubt in their minds prussic acid was the cause of death ;" and he added that, " when they had the fact proved beyond all mistake that prussic acid was in the stomach, they could not forget to take into consideration that this was after a violent and sudden death, for which prussic acid would account." " You must judge," said the learned Baron, " of the truth of the case against a person by all his conduct taken together."

It is always an important circumstance of moral conduct, that the suspected party has possessed the particular kind of poison which has been the cause of death, and had the opportunity of administering it. Some valuable observations upon this kind of evidence were made by Mr. Baron Rolfe in a case before him. The prisoner was indicted for the murder of his wife, who was taken seriously ill on the morning of the 25th of November and died two days afterwards, with symptoms resembling those which are produced by an irritant poison. Poisoning not having been then suspected, the body was interred without examination ; but suspicions having afterwards arisen, it was exhumed in the month of June following, and a large quantity of arsenic was discovered in the stomach. Several weeks after the apprehension of the prisoner, the police took possession of some of his garments, which were found hanging up in his lodgings, in the pockets of which arsenic was found. In his address to the jury Mr. Baron Rolfe said, " Had the prisoner the opportunity of administering poison ? that was one thing : Had he any motive to do so ? that was another. There was also another question, which *was most important ; it was, whether the party [*190] who had the opportunity of administering poison, had poison to administer ? If he had not the poison, the having the opportunity became unimportant. If he had the poison, then another question arose, did he get it under circumstances to show, that it was for a guilty or improper object ? The evidence by which it was attempted to trace poison to the possession of the prisoner, was, that on a certain occasion, after the death of the wife, and after he himself was apprehended, the contents of the pockets of a coat, waistcoat and trowsers, on being tested by the medical witnesses, were found to contain arsenic ; and that, a week afterwards, another waistcoat which came into the possession of the policeman, on being

examined, was also found to contain arsenic. Did that bring home to the prisoner the fact that he had arsenic in his possession in November? It was not conclusive that, because he had it in June, he had it in November. He (the learned judge) inferred from what had been stated by the medical men, that the quantity of arsenic found in the pocket of the clothes was very small. Now, if he had it in a larger quantity in November, and it had been used for some purpose, being a mineral substance, such particles were likely to remain in the pockets, and finding it there in June was certainly evidence that it might have been there in larger quantity in November; but obviously, by no means conclusive, as it might have been put in afterwards. But connected with the arsenic being found in the clothes, there were other considerations which he thought were worthy to be attended to. The prisoner was apprehended on the 9th of June, and he knew, long before that time, than an inquiry was going on. He was taken up, not in the clothes in which arsenic was found; and a fortnight afterwards a batch of clothes was given up in which arsenic was detected. Now if arsenic had been found in the clothes he was wearing, it would be
[*191] *perfectly certain, in the ordinary sense, that he had arsenic in his possession. But it was going a step further to say that, because arsenic was discovered in clothes of his, accessible to so many people between the time of his apprehension and their being given up, it was there when he was apprehended; in all probability he thought it was, but that was by no means the necessary consequence. That observation was entitled to still more weight, with regard to the waistcoat last given up to the police, because it was not given up till three weeks after the prisoner was apprehended, and had been hanging in the kitchen accessible to a variety of persons. If any one had had a diabolical motive or wish to excite prejudice against the prisoner, and to create a piece of evidence against him which did not in truth exist, he had the opportunity; and the learned counsel for the defence had pointed to the fact of three pockets containing arsenic as one which tended to show that the poison must have been placed there by some one who had overdone the thing in trying to bring into court too much evidence. These were matters which the jury must weigh very carefully. It was urged also that arsenic was used for cattle. It might be so, and it might be that the prisoner might innocently have had arsenic. The circumstance of there being arsenic in so many pockets ought not to be lost sight of, for it could scarcely be conceived that a guil-

ty person should be so utterly reckless as to put the poison he used into every pocket he had. One would have thought that he would have kept it concealed, or put it only in some safe place, for the immediate purpose of being used; and it was worthy of observation that it did not appear to have been put into the clothes in such a way as it would have been put, had the prisoner been desirous to conceal it." The prisoner was acquitted*.

It is manifestly impossible to assign any specific separate *force to each of the particular heads of inculpatory evidence which have been enumerated; and it is rarely, perhaps never, that in practice the case depends upon the distinct effect of any one of them. In most criminal charges the proof of the *corpus delicti* is separable from that which applies to the discrimination of the guilty individual; but it is not so in cases of poisoning, where it is generally impossible to obtain conclusive evidence of the *corpus delicti* irrespectively of the explanatory evidence of moral conduct and circumstances. It therefore almost of necessity happens, that there is a concurrence of all or most of these different kinds of evidence; and that the result depends not merely upon their separate force, but upon that additional force which is the consequence of this combination. [*192]

This part of the subject may be advantageously exemplified and closed, by an analysis of some of the most remarkable cases of charges of murder by poisoning which have occurred in our courts of justice; they will especially illustrate the manner in which the scientific evidence and moral facts are commonly combined, and the high degree of assurance which such combined proof is capable of producing.

John Donellan, Esq., was tried at Warwick spring assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Boughton, his brother-in-law, a young man of fortune, twenty years of age, who up to the moment of his death had been in good health and spirits, with the exception of a trifling ailment, for which he occasionally took a laxative draught. Mrs. Donellan was the sister of the deceased, and together with Lady Boughton his mother lived with him at Lawford Hall, the family mansion†. For some

* Reg. *v.* Graham, Carlisle Summer Assizes, 1845.

† It was stated by counsel, but does not appear in proof, that on attaining twenty-one Sir Theodosius would have been entitled absolutely to an estate of £2000 per annum, which in the event of his dying under that age would have descended to Mrs. Donellan.

[*193] *time before the death of Sir Theodosius, the prisoner had on several occasions falsely represented his health to be very bad, and his life to be precarious. On the 29th of August, the apothecary in attendance sent him a mild and harmless draught, to be taken the next morning. In the evening the deceased was out fishing, and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which representations were false. When he was called on the following morning, he was in good health; and about seven o'clock his mother went to his chamber for the purpose of giving him his draught, of the smell and nauseousness of which he immediately complained, and she remarked that it smelt like bitter almonds. In about two minutes he struggled very much, as if to keep the medicine down, and Lady Boughton observed a gurgling in his stomach; in ten minutes he seemed inclined to dose, but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the draught he died. Lady Boughton ran down stairs to give orders to a servant to go for the apothecary, who lived about three miles distant; and in less than five minutes the prisoner came into the bedroom, and after she had given him an account of the manner in which Sir Theodosius had been taken, he asked where the physic-bottle was, and she showed him the two bottles. The prisoner then took up one of them and said, "Is this it?" and being answered "yes," he poured some water out of the water-bottle, which was near, into the phial, shook it, and then emptied it into some dirty water, which was in a washhand basin. Lady Boughton said, "You should not meddle with the bottle;" upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger to it and tasted it. Lady Boughton again [* 194] asked what he was *about, and said he ought not to meddle with the bottles; on which he replied he did it to taste it, though he had not tasted the first bottle. The prisoner ordered a servant to take away the basin, the dirty things and the bottles, and put the bottles into her hands for that purpose; she put them down again on being directed by Lady Boughton to do so, but subsequently removed them on the peremptory order of the prisoner. On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the draught which he had taken. The prisoner had a still in his own room, which he had used for distilling roses; and a

few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned. The prisoner made several false and inconsistent statements to the servants, as to the cause of the young man's death; and on the day of his death he wrote to Sir William Wheeler, his guardian, to inform him of the event, but made no reference to its suddenness. The coffin was soldered up on the fourth day after the death. Two days afterwards Sir William Wheeler, in consequence of the rumours which had reached him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison, wrote a letter to the prisoner, requesting that an examination might take place, and mentioning the gentlemen by whom he wished it to be conducted. The prisoner accordingly sent for them, but did not exhibit Sir William Wheeler's letter, alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary sudden death, and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination, on the ground that it might be attended with personal danger. *On the following day [*195] a medical man, who had heard of their refusal to examine the body, offered to do so; but the prisoner declined his offer, on the ground that he had not been directed to send for him. On the same day the prisoner wrote to Sir William Wheeler a letter, in which he stated that the medical men had fully satisfied the family, and endeavoured to account for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination. Three or four days afterwards, Sir William Wheeler having been informed that the body had not been examined, wrote to the prisoner insisting that it should be done, which however he prevented, by various disingenuous contrivances, and the body was interred without examination. In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced; and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete. When Lady Boughton, in giving evidence before the coroner's inquest, related the circumstance of the prisoner having rinsed the bottles, he was observed to take hold of her sleeve, and endeavour to check her; and he afterwards told her, that she had no occasion to have mentioned that circumstance, but

only to answer such questions as were put to her; and in a letter to the coroner and jury, he endeavoured to impress them with the belief, that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish. Upon the trial, four medical men, three physicians and an apothecary, were examined on the part of the prosecution, and expressed a very decided opinion,—mainly grounded upon the symptoms, the suddenness of the death, the *post mortem* appearances, the smell of the draught as observed by Lady Boughton, and the similar effects produced by
[*196] *experiments upon animals,—that the deceased had been poisoned with laurel water; and one of them stated that, on opening the body, he had been affected with a biting acrimonious taste, like that which affected him in all the subsequent experiments with laurel water. An eminent surgeon and anatomist examined on the part of the prisoner stated a positive opinion, that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned, and that the appearances presented upon dissection explained nothing but putrefaction. The prisoner was convicted and executed*.

This trial has given rise to much diversity of opinion amongst legal and medical men; and certainly the scientific evidence was far from the completeness and exactness which are expected in the present state of science. But, nevertheless, when that evidence, imperfect as it was, is viewed in connection with the numerous moral circumstances, incapable of any explanation except as the manifestations of a guilty mind, it is difficult to arrive at any different conclusion from that deduced by the jury.

An elderly woman was tried at Bristol summer assizes, 1835, before the Recorder of that city, for the murder of a widow woman, about sixty years of age, who was possessed of considerable property in money, and after living in lodgings at various places for several years, ultimately went to live with the prisoner, who kept a lodging house at Bristol. In October 1833 the deceased became indisposed from a cold, and in the evening of the 26th of that month, the prisoner gave her some gruel, into which she was observed by a young woman, hired to wait on the deceased, to put some pinches of yellow powder, which she stated to be to relieve her from pain; after which she twice washed her hands. The servant remarked to the prisoner upon this as an unusual mode of administering a powder.

* Gurney's Shorthand Report, *ut supra*.

*The prisoner told the servant not to take anything out [*197]
of the vessels used by the deceased, falsely representing
her to be dirty in her habits, and cautioned her not to tell the deceased that she had put anything into the gruel, representing that if she knew there was anything in it she would not take it. The prisoner carried away what was left of the gruel; and in a few minutes after the deceased had taken it, she complained of being poorly, and in half an hour became ill; vomiting, purging and violent pain ensued, and in about two hours she expired. The prisoner had employed a man about six days previously to purchase arsenic to poison rats, a pretext which was proved to be groundless. The deceased was buried on the 28th of October; and her friends did not hear of her death until many months afterwards. From the change which took place in the prisoner's habits and mode of living immediately afterwards, from her denial that the deceased had left any property, and from some other circumstances, suspicions was excited, and the corpse was disinterred and examined on the 24th of December, 1834, and found to be in a remarkable state of preservation. The mucous membrane of the stomach and duodenum was smeared very thickly with a large quantity of a yellow substance, which penetrated in patches the coats of the stomach and intestines; and where the spots had penetrated, the inside of the intestinal canal was stained to a much greater extent than the outside, so that it must have penetrated from the interior to the exterior, as would be the effect of the matter having been taken into the stomach. The yellow powder found in the stomach was submitted to various experiments. Having been dried, some of it was triturated with carbonate of soda and charcoal, and introduced into a reducing tube, and immediately a volatile metallic body was formed, which was metallic arsenic; the metallic arsenic was then oxydized, when it sublimed into a white volatile oxide, which was characteristic of arsenious acid; a
*solution was then made of the oxide in two drops of [*198]
water, and a small portion of ammoniacal nitrate of silver
was added, when there was formed the characteristic lemon yellow precipitate. Into another portion a minute quantity of ammoniacal sulphate of copper was put, which immediately produced the green precipitate of Scheele. Afterwards a larger quantity was reduced, and a stream of sulphuretted hydrogen gas passed through it, and the original orpiment, or sulphuret of arsenic, reproduced. These various experiments were repeated five or six times, and uniformly with the same results. The stomach was then washed in water, and

the substance, allowed to precipitate and dried up, was weighed and found to contain seventeen grains. Lastly, the animal matter was destroyed and the arsenic dissolved, and the sulphur turned into sulphuric acid and precipitated by sulphuretted hydrogen gas, which reproduced sulphuret of arsenic. From thirteen grains of the mixed matter were obtained four grains of sulphuret of the arsenic; and there were still some portions adhering to the stomach which could not be washed off; and some had been evacuated by vomiting. The prisoner was convicted and executed.

No case of this kind ever exceeded in interest and completeness that of John Tawell, a man about sixty years of age, who was tried at Aylesbury spring assizes, 1845, before Mr. Baron Parke, for the murder, by means of prussic acid, of a woman who had lived as servant with him for several years, and borne him two children. Several years ago, on his desiring to marry, she had gone into seclusion, and had ever since received from him a regular allowance. The prisoner was seen by a neighbor to enter the deceased's house near Slough, between four and five o'clock in the afternoon of the 1st of January preceding. Between six and seven o'clock, [*199] hearing a stifled scream in *the deceased's house, she took a candle, and going to her own door saw the prisoner coming out of it. Fearing that her neighbor was ill, she went to the gate of a small garden which led to her house, where she met the prisoner, who seemed agitated and could not open it, which she did for him. On getting up to the house she found the deceased lying motionless on the floor, her eyes fixed, foaming at the mouth and breathing convulsively. On the table there was a bottle partly filled with porter, two tumblers, one of them half filled with porter, and the other with only a little froth in it. Medical assistance was immediately procured, and a vein was opened in the arm, from which about an ounce of blood flowed, but life was extinct. The deceased previously to the prisoner's visit had been in good health, and had intimated to her neighbors that she expected to see her "old master" in the course of the day, and between six and seven o'clock she went to a neighboring tavern to procure a bottle of porter. After leaving the deceased's house, the prisoner was seen about seven o'clock running towards Slough, where he got into an omnibus which was proceeding towards Eton, at some distance from that place he alighted, desiring to be set down at Hershel House, where however he did not call. At forty minutes past seven the prisoner had again returned to Slough, and in two or three minutes afterwards proceeded

by railway back to London. In consequence of these suspicious circumstances a communication was made from Slough soon after the prisoner left, by means of the electric telegraph to the Paddington station, where upon his arrival he got into an omnibus, and was watched by a police officer in plain clothes, who got up behind and acted as conductor, and traced him to the Jerusalem Coffee-house on Cornhill, where he called about half-past nine, and from thence to a lodging-house, where he slept. On the following morning the prisoner was taken into custody, and *on being told [*200] by the officer of the cause of his apprehension, declared that he had not been at Slough the preceding day. It was discovered that on the day of the deceased's death the prisoner had purchased a bottle of Scheele's prussic acid at a druggist's shop in London, that about three o'clock in the afternoon he had called at the Jerusalem Coffee-house for the purpose of leaving a great-coat and parcel, for which he said he would call about half-past nine, stating that he was going to dine at the west-end, that instead of doing so however, he went by railway at four o'clock from the Paddington station to Slough, and that on the following morning, before his apprehension, he had purchased at the same shop where he had obtained the first quantity a further supply of prussic acid, having, as he said, lost that which he obtained the day before. To the officer in whose custody he was placed, during the sitting of the coroner's inquest, the prisoner stated, that the deceased had formerly lived with him as servant, and was a very good servant, but a very bad-principled woman,—that he had been in the habit of sending her money,—that she had pestered him by letters, in which she had threatened to destroy herself if he did not send her some,—that on the evening in question they had an altercation, in the course of which he had told her he would not allow her any more money,—that she then asked him for some porter, which she went for and procured from a neighboring tavern,—that she poured something into it from a small phial, and drank of it, and then began to throw herself about,—and that he left, thinking her illness feigned, or else would have called some one. The prisoner attempted to explain his possession of prussic acid by stating that he had been in the habit of using it on account of varicose veins; but no proof was adduced that he had suffered from that cause. It was proved that the deceased had been extremely ill after drinking part of a *bottle of porter, for which the prisoner had sent her [*201] out on a preceding visit, about three months before, when

he paid to her her allowance. On examination of the body the day after death, the brain and viscera were found to be healthy. The odour of prussic acid was perceptible as soon as the body was opened, although no such odour had been remarked upon smelling at the mouth. No deleterious ingredients were found in the porter which remained in the bottle and glass. After a portion of the contents of the stomach had been tested for several other poisons, another portion was put into a tubulated retort, to which was added a very small quantity of dilute sulphuric acid; the retort was then placed on the sand-bath, and a portion distilled off and collected, about two drachms of which were put into a test-glass, to which a grain of green sulphate of iron was added, and when this was dissolved, a small quantity of potassa. Muriatic acid being added to this mixture, prussian blue instantly appeared, showing the presence of cyanogen in some form. It was stated that the presence of the fluid would prevent the sand-bath from decomposing the animal matters present in the contents; but to exclude all possibility of referring the poisonous matters to such decomposition, another portion of the contents of the stomach was distilled at a lower temperature by the water-bath, to which salt was added for the purpose of increasing the temperature, which by that means can be raised from 212° to 226°; when, on applying the same tests as before, prussian blue was again found in considerable quantity. Nitrate of silver was then added to a portion of the fluid, for the purpose of separating the cyanogen it contained, when it threw down an insoluable white precipitate forming cyanide of silver, which being put into a small retort with a very small quantity of muriatic acid, and carefully distilled over into a cool receiver, yielded rather more than a drachm of diluted [*202] prussic acid, which, *on being again treated with nitrate of silver, yielded the cyanide of silver. This precipitate could not be dissolved in cold nitric acid, but was dissolved by boiling nitric acid; and the gas produced by heating the cyanide of silver was then collected and burnt, producing a peculiar purple-coloured flame, characteristic of the presence of cyanide of silver. The quantity of cyanide of silver actually obtained was 1·455 grains, very slightly contaminated with chloride of silver, amounting to a quantity which could not be collected and weighed, for which allowing ·025 grains, the quantity of cyanide of silver was 1·43; and as the quantity of matter operated upon was to the whole contents of the stomach as 51 to 180, the latter must have contained 5·047

grains of cyanide of silver, which are equivalent to 1·002 grains of hydrocyanic or prussic acid, or 50 grains of prussic acid of the strength of the London Pharmacopœa,—a quantity more than sufficient to destroy life.

It was urged for the prisoner, that the poison might have been generated from apples, of which some pulp was found in the stomach, but this subterfuge was disproved by the circumstance that prussic acid is contained only in the pips, and could not be obtained except by distillation; whereas it had been smelt on opening the body, when it was not possible that it could have been produced by distillation; and by a satisfactory experiment it was shown that from the pips of fifteen apples there was obtained only an inappreciable quantity. Slight evidence was adduced of pecuniary embarrassment, and a desire to absolve himself from the burden of his allowance to the deceased was suggested as the prisoner's motive for the commission of so horrid a crime. The jury returned a verdict of guilty, and the prisoner was executed; having before his execution made a full confession of his guilt, as also that he had, as had been suspected, made a former attempt to poison *the de- [*203] ceased by means of morphia, which he had mixed with the porter of which his unsuspecting victim had partaken, stating his motive to have been to prevent his criminal connexion from becoming known to his wife, of which he lived in apprehension. The reports of criminal justice present no more satisfactory case of circumstantial evidence, whether as regards the scientific testimony or the moral facts; and all the circumstances conclusively rebutted the prisoner's crafty attempt to account for the catastrophe by self-destruction.

SECTION 5.

APPLICATION OF THE GENERAL PRINCIPLE TO PROOF OF THE CORPUS DELICTI IN CASES OF INFANTICIDE.

Of all crimes, that of Infanticide perhaps presents the greatest difficulties in the establishment of the *corpus delicti*.

1.) Among the embarrassments peculiar to cases of this nature must be mentioned, the occasional uncertainty and inconclusiveness of the symptoms of pregnancy, the fundamental fact to be proved*,

* Hume's Comm. *ut supra*, p. 464.

which may resemble and be mistaken for appearances caused by obstructions or spurious gravidity*. In a remarkable case of this kind, the suspicion of pregnancy arose principally from the bulk of the deceased while living, coupled with circumstances of conduct which denoted the existence of an improper familiarity between the parties, and from the discovery upon *post mortem* examination of what was believed by the witnesses for the prosecution to be the placental mark. Four medical witnesses expressed the strongest belief, that the deceased had been recently delivered of a child nearly come to maturity; while on the other hand, it was proved that she had been subject to obstructions; and it was deposed that the appearances of the uterus might be accounted for by hydatids, a species of dropsy in that part of the body, and that what was thought to be the placental mark might be the pediculi by which they were attached to the internal part of the internal surface of the womb†. The learned judge said to the jury, that it was a very unfortunate thing, that upon every particular point they had to rest upon conjecture; that it was a conjecture to a certain extent that the deceased was with child, and that it was conjecture to a certain degree that any means were used to procure abortion: and, if they were used, that it was conjecture that the prisoner was privy to the administration of them.

[*204]

2.) It must be clearly proved that a child has been born alive, and acquired an independent circulation and existence; it is not enough that it has breathed in the course of its birth‡; but if a child has been wholly born, and is alive, and has acquired an independent circulation, it is not material that it is still connected with its mother by the umbilical cord§, nor is it essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after birth‖.

Whether a child has been born alive or not is frequently a question of considerable difficulty; and it is an admonitory con-

* Rex v. Bate, Warwick Summer Assizes, 1809. Rex v. Ferguson, Burnett's C. L. *ut supra*, p. 574.

† Rex v. Angus, Lancaster Autumn Assizes, 1805, *coram* Mr. Justice Chambre, Short-hand Report. Burnett's C. L. of Scotl. p. 575.

‡ Rex v. Poulton, 5 C. & P. 329. Rex v. Enoch, *ib.* 536. Rex v. Crutchley, 7 *ib.* 814. Rex v. Sellis, *ib.* 850.

§ Reg. v. Reeves, 9 *ib.* 25. Reg. v. Wright, *ib.* 754. Reg. v. Trilloe, 1 C. & M. 650.

‖ Rex v. Brain, 6 C. & P. 350.

sideration, that scientific tests which have been *con- [*205]
sidered as infallible, with the advance of knowledge have
been found to be fallacious. Such is the case with respect to the hydrostatic test, from the indications of which in former times many women have suffered the last penalty of the law. On the trial of a woman at Winchester spring assizes, 1835, it was proved that the lungs were inflated; which the medical witness said would not have been the case if the child had been still-born: but he stated, in answer to a question from Mr. Baron Gurney, that if the child had died in the birth the lungs might have been inflated, upon which he stopped the case*. A single sob, it appears, is sufficient to inflate the lungs, though the child die in the act of birth†. A young woman was tried before Mr. Baron Parke for the murder of her female child; the throat was cut, and the wound had divided the right jugular vein; the lungs floated in water, and were found on cutting them to be inflated: but it was deposed that this test only showed that the child must have breathed, and not that it had been born alive, and that there are instances of children being lacerated in the throat in the act of delivery. On the close of the case for the prosecution, the learned judge asked the jury whether they were satisfied that the child was born alive, and that the wound was inflicted by the prisoner with the intention of destroying life: as if they entertained any doubt on these points, it would be unnecessary to go into the evidence on behalf of the prisoner. The jury returned a verdict of acquittal‡.

3.) It is a further source of uncertainty in cases of this nature, that circumstances of presumption frequently adduced as indicative of the crime of murder, may commonly be accounted for by the agency of less malignant motives. Concealment of preg-
nancy and delivery may proceed even *from meritorious [*206]
motives: as where a married woman resorted to such
concealment in order to screen her husband, who was a deserter, from discovery§. Severe must be the struggle between the opposing motives of shame and affection, before a mother can contemplate, and still more so before she can form and execute, the dreadful and unnatural resolution of taking away the life of her own offspring. The unhappy object of these conflicting motives is commonly the victim

* Rex v. Simpson, Cummin on the Proof of Infanticide, p. 40

† Rex v. Davidson, 1 Hume's Comm. *ut supra*, 486.

‡ Rex v. Grounall, Worcester Spring Assizes, 1837.

§ Rex v. Stewart, Burnett's C. L. *ut supra*, p. 372.

of brutality and treachery. Deserted by a heartless seducer, and scorned by a merciless world, scarcely any condition of human weakness can be imagined more calculated to excite the compassion of the considerate and the humane*. The wisdom and humanity of the legislature, in accordance with the spirit of the times, have led to the repeal of the cruel rule of presumption created by statute 21 Jac. 1. c. 27, which made the concealment of the death of an illegitimate child by its mother conclusive evidence of murder, unless she made proof by one witness at least that the child was born dead; a rule which had too long survived the barbarous age in which it originated, and under which it is but too probable that many women have unjustly suffered†: and the endeavouring to conceal the birth of a child by secret burying, or otherwise disposing of the body, instead of being treated as a conclusive presumption of murder, has been made a substantive misdemeanor‡.

4.) The casualties which even in favourable circumstances are inseparable from parturition, must be incalculably aggravated by the perplexities incidental to illegitimate, clandestine and unassisted birth, from the impulses of shame and alarm, the desire of concealment, the want of assistance and sympathy, and occasionally from the mother's inability to render the attentions requisite to preserve infant life; and there have been cases in which even the very means resorted to, under the terror of the moment, to facilitate birth have been the unintentional cause of death. For these reasons, wounds and other marks of violence are not necessarily considered as indicative of wilful injury, and are not therefore sufficient to warrant a conviction of murder, unless the concomitant circumstances clearly manifest that they were knowingly inflicted upon a body born alive. Nor are these principles of construction peculiar to our own law; it is believed that they prevail generally, if not universally, in the application of the criminal law to cases of this nature§.

[*207]

It follows from the preceding considerations, that though the facts may justify extreme suspicion that death has been the result of intentional violence, yet if they do not entirely exclude every other possible hypothesis by which it may be reasonably accounted for, the soundest principles of justice, and a proper regard to the fallibility of human judgment in cases so mysterious as these cases most fre-

* See 1 Hume's Comm. 462.
† *Ibid.* p. 486.
‡ St. 9 Geo. IV. c. 31. s. 14.
§ Allison's Princ. p. 159.

quently are, combine to forbid the adoption of a conclusion so abhorrent to nature and humanity, and the infliction of a punishment which admits of no recall.

It has been thought that in cases of this kind, the feelings of humanity have been permitted to bias the strict course of judicial truth, and that countenance has been given to subtle and strained hopotheses for the explanation of circumstances of conclusive presumption*. If that opinion were correct, it would constitute a serious reproach upon the administration of justice, and would show that the law is not in harmony with public feeling: but it may be doubted whether sufficient weight has been given to the difficulties of proof inseparably incidental to cases of this description, and [*208] whether, in fact, acquittals often take place where the crime has been so clearly and satisfactorily proved as entirely to dispel all doubt, and to produce complete and undoubting assurance.

The discussion and illustration of the rules and principles of evidence, in reference to the proof of the *corpus delicti*, might be extended to an examination of their application to other offences; but the subject has been sufficiently exemplified for the purposes of this Essay, and such an extended examination would therefore be superfluous and transgress its legitimate limits. The cases which have been cited strikingly exhibit the strict accordance between judicial practice and the dictates of enlightened reason.

* Whately on Secondary Punishments, p. 108.

[*209]

*CHAPTER VIII.

OF THE FORCE AND EFFECT OF CIRCUMSTANTIAL EVIDENCE.—CONCLUSION.

SECTION 1.

GENERAL GROUNDS OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

In considering the force and effect of circumstantial evidence, the credibility of the *testimony* as distinguished from the credibility of the *fact* is assumed, since it is a quality essential to the value of circumstantial in common with all moral evidence.

Our faith in moral evidence is grounded, as we have seen, upon our confidence in the permanency of the order of nature, and in the reality and fidelity of the impressions received by means of the senses, which place us in connexion with the external world and with other men; and upon the laws of our moral and intellectual being, the immutability of moral distinctions, and the authority of conscience;* so that if we could correctly estimate and were able to eliminate the various disturbing influences which tend to divert men from the path of truth and rectitude, our reasonings and conclusions would possess all the force of demonstration.

The silent workings, and still more the fearful explosions, of human passion which bring to light the darker elements of
[*210] *man's nature, must ever present to the philosophic observer considerations of deep intrinsic interest; while to the jurist, the moral and mechanical coincidences which connect different facts with each other, are relevant and all-important, as they are the intermediate connecting links between criminal actions and the malignant feelings and dispositions in which they originate.

The distinct and specific proving power of circumstantial evidence as incidentally stated in a former part of this Essay, depends upon its incompatibility with, and incapability of explanation upon, any other reasonable hypothesis, consistent with the ordinary course of nature, than that of the truth of the principal fact in proof of which it is adduced:† so that, after the exhaustion of every other

* See *ante*, p. 10.

† *Supra*, p. 26.

possible and admissible mode of solution, we must either conclude that the accused has been guilty of the fact imputed, or renounce as illusory and deceptive all the results of consciousness and experience, and all the operations of the human mind.*

Conclusions thus formed are simple inferences of the understanding, aided and corrected by the application of those rules of evidence and those processes of reason which sound and well-ripened experience has consecrated as the best methods of arriving at truth; and they constitute that MORAL CERTAINTY upon which men securely act in all other great and important concerns, and upon which they may therefore safely rely for the truth and correctness of their conclusions in regard to those events which fall within the province of criminal jurisprudence. "If," said Lord Chief Baron Pollock to the jury in a late case, "the conclusion to which you are conducted be, that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the *degree of certainty which the law requires, and which [*211] will justify you in returning a verdict of guilty.†"

Many continental codes prescribe imperative *formulæ* descriptive of the kind and amount of evidence necessary to constitute legal proof. But the diversities of individual men render it impracticable thus definitely to estimate the fleeting shades and infinite combinations of human motives and actions; or thus to fix, with arithmetical exactness, a common standard of proof, which shall influence with unvarying intensity and effect the minds of all men alike. Such rules are not merely harmless, nor simply superfluous; they are positively pernicious and dangerous to the cause of truth; and while they operate as snares for the conscience of the judge, they are unnecessary for the protection of the innocent, and effective only for the impunity of the guilty.‡

The very few cases in which the law of England requires a particular amount of evidence, as on trials for high treason and perjury, where two witnesses are required, are obviously grounded upon different principles; in the former, upon motives of policy and justice, for the protection of persons charged with political crime from becoming the victims of party violence; and in the latter, because the mere contradiction by the oath of a single witness is obviously not

* Mittermaier, *ut supra*, ch. 59.

† Reg. *v.* Manning and Wife, C. C. Court, Oct. 1849.

‡ Mittermaier, *ut supra*, ch. 8.

of itself sufficient to prove that the party accused has been guilty of wilful falsehood.

If it be proved that a party charged with crime has been placed in circumstances which commonly operate as inducements to commit the act in question,—that he has so far yielded to the operation of those inducements as to have manifested the disposition to commit the particular crime,—that he has possessed the requisite means and opportunities of effecting the object of his wishes,—that [*212] recently *after the commission of the act he has become possessed of the fruits or other consequential advantages of the crime,—if he be identified with the *corpus delicti* by any conclusive mechanical circumstances, as by the impressions of his footsteps, or the discovery of any article of his apparel or property at or near the scene of the crime,—if there be relevant appearances of suspicion, connected with his conduct, person, or dress, and such as he might reasonably be presumed to be able to account for, but which nevertheless he cannot or will not explain,—if he be put upon his defence *recently* after the crime, under strong circumstances of adverse presumption, and cannot show where he was at the time of its commission,—if he attempt to evade the force of those circumstances of presumption by false or incredible pretences, or by endeavours to evade or pervert the course of justice by conduct inconsistent with the supposition of his innocence,—the concurrence of all or of many of these cogent circumstances, unopposed by facts leading to a counter presumption, naturally, reasonably and satisfactorily establishes the moral certainty of his guilt,—if not with precisely the same kind of assurance as if he had been seen to commit the deed, at least with all the assurance which the nature of the case and the vast majority of human actions admit. In such circumstances we are justly warranted in adopting, without qualification or reserve, the conclusions to which, "by a broad, general and comprehensive view of the facts, and not relying upon minute circumstances with respect to which there may be some source of error,*" the mind is thus naturally and inevitably conducted, and in regarding the application of the sanctions of penal law as a mere corollary. Nor can any practice be more absurd and unjust, than that perpetuated in some modern codes, which, while they admit of proof by [*213] *circumstantial evidence, inconsistently denies to it its logical and ordinary consequences. Thus the penal code

* Per Lord C. B. Pollock in Reg *v.* Manning and wife, *ut supra*.

of Austria* prohibits the application of capital punishment to the crime of murder, "ou l'inculpé n'est convaincu que par le concours des circonstances;" but nevertheless the party may be sentenced to an imprisonment of twenty years; and the same practice prevails in many other states, though with considerable diversity as to the maximum amount of penalty.† How wise and just the emphatic condemnatory language of the French Papinian: "Et preterea ut veritas ita probatio scindi non potest: quæ non est plena veritas est plena falsitas, non semiveritas sic quæ non est plena probatio, plane nulla probatio est.‡"

SECTION 2.

CONSIDERATIONS WHICH AUGMENT THE FORCE OF CIRCUMSTANTIAL EVIDENCE IN PARTICULAR CASES.

Such are the considerations which constitute the force and effect of circumstantial evidence in *general;* but there are some collateral considerations which augment the force of circumstantial evidence in *particular* cases, and greatly increase the strength and security of our convictions, upon which it will be expedient to dilate.

1.) The principal of these auxiliary considerations arises from the concurrence of many or of several separate and independent circumstances pointing to the same conclusion, especially if they be deposed to by unconnected witnesses. In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes, and the more secure becomes our conviction of the moral certainty of the *fact they are alleged to prove; as the intensity of light [*214] is increased by the concentration of a number of rays to a common focus. It is forcibly remarked by a learned writer, that "the more numerous are the particular analogies, the greater is the force of the general analogy resulting from the fuller induction of facts, not only from the mere accession of particulars, but from the additional strength which each particular derives by being surveyed jointly with other particulars, as one among the correlative parts of

* Première Partie, Art. 430.

† See note, *ante*, p. 24, and Mittermaier, *ut supra*, ch. 61.

‡ Cujas, Cod. t. de Leg., and see Gabriel, *ut supra*, 67.

a system.*" Although neither the combined effect of the evidence, nor any of its constituent elements, admits of numerical computation, it is indubitable, that the proving power increases with the number of the independent circumstances and witnessess, according to a geometrical progression. "Such evidence," in the words of Dr. Reid, "may be compared to a rope made up of many slender filaments twisted together. The rope has strength more than sufficient to bear the stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose.†"

The increase of force produced by the concurrence of independent *circumstances*, is analogous to that which is the result of the concurrence of several independent *witnesses* in relating the same fact; and if these elements admit of numerical evaluation, their combined effect may be represented by a fraction, which has for its numerator the product of the chances favourable to the testimony of each witness, and for its denominator, the sum of all the chances, favourable and unfavourable, the unfavourable chances being the product of the several deficiencies of the witnesses. But if the witnesses to the fact be dependent on each other, so that the testimony of the second depends for its truth upon the first, that of the third upon
[*215] the *second and so on, then the effect of the evidence diminishes with every increase in the number of the witnesses or the facts, just as an increase in the denominator of a fraction reduces it to one of an inferior value.‡

A learned writer has illustrated the subject by a case which at first sight seems an extreme one, and it has occasionally been pressed in argument with much force§. "Let it be supposed," says he, "that A. is robbed, and that the contents of his purse were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns, and that a person apprehended in the same fair or market where the robbery takes place is found in possession of the same remarkable combination of coin and of no other, but that no part of the coin can be identified; and that no circumstances operate against the prisoner except his possession of the same combination of coin: here, notwithstanding the very extraordinary coincidence as to the number of each individual kind

* Hampden's Essay, *ut supra*, p. 63.

† Essay on the Intell. Pow. chap. iii.

‡ Kirwan's Logic, vol. ii. ch. vii. Hartley's Obs. ch. iii. s. 2. prop. lxxx.

§ Trial of the Rev. Ephraim Avery, charged with the murder of Sarah Maria Cornell, before the Supreme Court of Rhode Island, May, 1833. (Boston.)

of coin, although the circumstances raise a high probability of identity, yet it still is one of a definite and inconclusive nature*." The probability that the coins lost and those discovered are the same is so great, that perhaps the first impulse of every person unaccustomed to this kind of reasoning is unhesitatingly to conclude that they certainly are so; yet, nevertheless, the case is one of probability only, the degree of which is capable of exact calculation: but if that degree of probability, high as it is, were sufficient to warrant conviction in the particular case, it would be impossible to draw the distinction between the degree of probability which would and that which would not justify the infliction of penal [*216] retribution in other cases of inferior probability. In the case of a small number of coins, two or three for instance, the probability of their identity would be very weak; and yet the two cases, though different in degree, are in principle the same; and the chance of identity is in both cases equally capable of precise determination. The learned writer adds, that, "although the fact taken nakedly and alone, without any collateral evidence, would in principle be inconclusive, yet, if coupled with circumstances of a conclusive tendency, such as flight, concealment of the money, false and fabricated statements as to the possession, it might afford strong and pregnant evidence of guilt for the consideration of the jury." In like manner it would be difficult to resist the inference of the identity of the coins, if in the case supposed they were scarce or foreign ones.

From the number of qualifying considerations connected with facts which are the subjects of testimonial evidence, and the impracticability of forming an exact numerical estimate of the veracity of witnesses, the cases to which this kind of reasoning is applicable, if there be any such, must be very rare. It is manifest, that every combination of moral incidents and contingent probabilities must give a product of the same nature, and affected by the same sources of error and uncertainty, as affect its separate elements; and in all judgments grounded upon circumstantial evidence, this fundamental difference between moral and mathematical certainty must be borne in mind. "It were absurd," declares an eminent philosopher, "to say that the sentiment of belief produced by any probability is proportioned to the fraction which expresses that probability; but it is so related to it, or ought to be so, as to increase when it increases,

* Starkie's L. of Ev. i. 506.

and to diminish when it diminishes*." It is manifest,
[*217] however, that the consequence *of the concurrence of a plurality of witnesses, and the conjunction of separate circumstances, is to add immensely to the force of each; and if the credit of the witnesses be unimpeachable, and the hypotheses of confederacy and error be excluded, then no other conclusion can be rationally adopted, than that the facts to which they depose are true. The case suggested is that of circumstantial evidence in its most cogent form; and in such case, the conclusion to which its various elements converge must be regarded as morally irresistible.

2.) Independently of the direct effect of that probability which results from a concurrence of independent witnesses or circumstances, the security of our judgments is further increased from the considerations, that in proportion to the number of such witnesses or circumstances confederacy is rendered more difficult, and that increased opportunities and facilities are afforded of contradicting some or all of the alleged facts if they be not true. To preserve consistency in a work even professedly of fiction, where all the writer's art and attention are perpetually exerted to avoid the smallest appearance of discrepancy, is an undertaking of no common difficulty; and it is obvious that the difficulty must be incomparably greater of preserving coherency and order in a fabricated case which must be supported by the confederacy of several persons, where, since by the hypothesis the congruity results from artifice, the slightest variation in any of the minute circumstances of the transaction or of its concomitants may lead to detection and exposure. On the other hand, though if the main features of the case do not satisfactorily establish guilt, it is not safe to rely upon very minute circumstances†, yet, if the statements of the witnesses are based upon realities, the more rigorously they are sifted the more satisfactory will
[*218] be the general result, from the development of minute, *indirect, and unexpected coincidences in the attendant minor particulars of the main event. It was happily remarked by Dr. Paley, that "the *undesignedness* of the agreements (which undesignedness is gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist, to the places in which those circumstances occur, and the circuitous references by which they are traced out) demonstrates that they

* Playfair's Works, iv. 437.

† Per Mr. Baron Rolfe, in Reg. *v.* Rush, Norfolk Sp. Ass. 1849.

have not been produced by meditation or by any fraudulent contrivance. But coincidences from which these causes are excluded, and which are too numerous and close to be accounted for by accidental concurrences of fiction, must necessarily have truth for their foundation*." The same learned writer also justly remarks, that "no advertency is sufficient to guard against slips and contradictions when circumstances are multiplied†." Hence it is observed in courts of justice, that witnesses who come to tell a concerted story are always reluctant to enter into particulars, and perpetually resort to shifts and evasions to gain time for deliberation and arrangement, before they reply directly to a course of examination likely to bring discredit upon their testimony.

It must nevertheless be admitted that history and experience supply abundant evidence that it would be most erroneous in the abstract to decide a matter of fact by numbers, and that there have been extraordinary cases of false charges, most artfully and plausibly supported by connected trains of feigned circumstances‡.

[*219] *But considering the circumstances of the class of persons most frequently subjected to accusation for alleged crime,—deprived of personal freedom, often friendless, and still more frequently destitute of pecuniary resources and professional aid,—their imperfect means of knowing all the facts proposed to be proved, or the manner in which they are attempted to be connected, —the alleged facility of disproof is often more imaginary than real. Lord Eldon thus forcibly expressed himself on this question: "I have frequently thought," said his Lordship, "that more effect has been given, than ought to have been given, in what is called the summing up of a judge on a trial, to the fact, that there has not been the contradiction on the part of the defence, which it is supposed the witnesses for the accusation might have received. . . . . It may often happen that, in the course of a trial, circumstances are proved which have no bearing on the real question at issue; and it may also happen, that facts are alleged and sworn to by witnesses, which it is impossible for the accused party to contradict; circumstances may be

* Paley's Evid. part ii. ch. vii. Whately's Rhet. part i. ch. ii. s. 4. Greenleaf's Ex. *ut supra*, p. 39.

† Horæ Paulinæ, chap. i.

‡ See Rex *v.* Squires and Wells; 19 St. Tr. 275; the prosecutrix in which case was afterwards convicted of perjury: Rex *v.* Bowditch and others, Dorchester Summer Assizes, 1818, *coram* Mr Justice Park; short-hand report by Richardson, where prosecutrix was also subsequently convicted of perjury; and Report of the proceedings in an action, Mary Smith *v.* Lord Ferrers, printed by Pickering, 1846.

stated by witnesses which are untrue; yet they may not be contradicted, because the party injured by them, not expecting that that which never had any existence would be attempted to be proved, cannot be prepared with opposing witnesses. So also, in cases in which an individual witness speaks to occurrences, at which no other person was present but himself, there it may be absolutely impossible to contradict him*."

Many of the disadvantages under which prisoners on trial are necessarily placed have been removed or diminished by the provisions of Stat. 6 and 7 Will. IV., c. 114. ss. 3 and 4, which [*220] give to persons held to bail or committed *to prison *a right* to require copies of the examination of the witnesses upon whose evidence they have been held to bail or committed, on payment of a moderate charge, and at the time of trial to inspect the depositions returned into Court. The argument founded on the means afforded of disproof may consequently now be urged, at least in most cases, with more justice and effect than formerly, though even still a party charged with crime has no means of knowing any facts which may not have been brought forward prior to his commitment, or which may have been discovered in the interval before trial; nor does the enactment extend to cases of commitment by the coroner†, or of indictment found without previous commitment. There are moreover many cases which do not afford the alleged facility of disproof in any degree; where, even admitting the truth of the testimony, the supposed presumption of guilt is nothing more than a mistaken conclusion from facts which afford no warrant for the inference of guilt; in such circumstances to attempt disproof is to attempt to grapple with a shadow,—to require it, to exact an impossibility.‡

3.) The preceding considerations imply the necessity of consistency and general harmony in the testimony of different witnesses. All human events must necessarily form a coherent whole; and actual occurrences can never be mutually inconsistent. If one of two witnesses depose that he saw an individual at London, and the other that he saw him at York at or near the same precise moment, the accounts are absolutely irreconcileable, and one or other of them must by design or inadvertence be untrue. A diversity ought al-

* Hansard's Parl. Deb. 2nd series, iii. 1445.

† Rex *v.* Greenacre, 8 C. & P. 32. Reg *v.* Connor, Cambridge Sp. Ass. 1845, *coram* Mr. Justice Patteson, 5 L. Times, 495.

‡ Rex *v.* Looker, Rex *v.* Downing, and Rex *v.* Thornton, *ut supra.*

ways to excite caution and a scrupulous regard to the capacity, situation, and disposition of the *witnesses, and especially to the possibility of confusion from some mental emotion. [*221] "We are frequently mistaken," said Lord Chief Baron Pollock, "even as to what we may suspose we see; and still oftener are we mistaken as to that which we suppose we hear*." Lord Clarendon relates, that in the alarm created by the Fire of London, so terrified were men with their own apprehensions, that the inhabitants of a whole street ran in a great tumult one way, upon a rumour that the French were marching at the other end of it†. The same noble historian has also given another anecdote relating to that great calamity, too instructive as applicable to this subject to be omitted. A servant of the Portuguese ambassador was seized by the populace and pulled about, and very ill-used, upon the accusation of a substantial citizen, who was ready to take his oath that he saw him put his hand into his pocket, and throw a fire-ball into a house, which immediately burst into flames. The foreigner, who could not speak English, heard these charges interpreted to him with amazement. Being asked, what it was that he pulled out of his pocket, and what it was he threw into the house, he answered, that he did not think he had put his hand into his pocket, but that he remembered very well that as he walked in the street he saw a piece of bread upon the ground, which he took up and laid upon a shelf in the next house, according to the custom of his country; which, observes a learned writer‡, is so strong, that the King of Portugal himself would have acted with the same scrupulous regard to general economy. Upon searching the house which was in view, the bread was found just within the door upon a board as described; and the house on fire was two doors beyond it, the citizen having erroneously *con- [*222] cluded it to be the same; "which," says Lord Clarendon, "was very natural in the fright that all men were in§."

But *variations* in the relations by different persons of the same transaction or event, in respect of unimportant circumstances, are not necessarily to be regarded as indicative of fraud or falsehood, provided there be substantial agreement in other respects. True strength of mind consists in not allowing the judgment, when founded upon convincing evidence, to be disturbed because there are im-

* In Reg *v.* Manning and Wife, *ut supra.*

† Life, and Continuation, etc., iii. 91, Oxford ed., 1827.

‡ Woodeson's Lect. on the Laws of England, iii. Lect. 53.

§ Clarendon's Life and Continuation, iii, 86.

material discrepancies which cannot be reconciled. When the vast inherent differences in individuals with respect to natural faculties and acquired habits of accurate observation, faithful recollection, and precise narration, and the important influence of intellectual and moral culture, are duly considered, it will not be thought surprising that entire agreement is seldom found amongst a number of witnesses as to all the collateral incidents of the same principal event. "I know not," says Paley, "a more rash or unphilosophical conduct of the understanding than to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. That is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witness, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These circumstances are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud*.

Instances of discrepancy as to the minor attendant circumstances of historical events are numberless. Lord Clarendon re-
[*223] lates *that the Marquis of Argyle was condemned to be *hanged*, and that the sentence was performed the *same day*. Burnet, Woodrow, and Echard, writers of good authority, who lived near the time, state that he was *beheaded*, though condemned to be hanged, and that his sentence was pronounced on Saturday and carried into effect on the Monday following†. Charles the second, after his flight from Worcester, has been variously stated to have embarked at Brighthelmstone and at New Shoreham‡. Clarendon states that the royal standard was erected about six o'clock of the evening of the 25th of August, "a very stormy and tempestuous day;" whereas other contemporary historians variously state that it was erected on the 22nd and 24th of that month§. By some historians the death of the Parliamentary leader Pym, is stated to have taken place in the month of May 1643‖; while by others it

* Puley's Ev. part iii. cap. 1.

† Comp. Life and Continuation, ii. 266, and Paley's Ev. part iii. ch. 1.

‡ Hist. of the Reb. vi. p. 541. Lingard's Hist. of Eng. vol. xi. c. 1.

§ Hist. of the Reb. iii. 190. Rushworth's Coll. i. part 3 p. 783. Mem. of Ludlow, p. 15.

‖ Whitelock's Mememorials, p. 66. Baker's Chron. p. 570. b. Hist. of the Reb. iv. 436. Hume's Hist. vi. 540, ed. 1818. Goodwin's Hist. of the Comm. i. 17.

is said to have occurred in the following year. To come nearer to our own times, the author of a celebrated biographical memoir relates, that after the rebellion of 1745 three lords were executed at Tower-hill; whereas it is well known that *two* only underwent that doom, the third, Lord Nithsdale, having effected his escape the night before his intended execution.* Such discrepancies never excite a serious doubt of the truth of the principal facts with which they are connected; unless they can be traced to the operation of prejudice or some other sinister motive.† It has been most happily remarked, [*224] that "the last thing a man would think of doing, in such cases, would be to neglect the preponderant evidence, on account of the residuum of insoluble objections;" that "he does not, in short, allow his ignorance to control his knowledge, nor the evidence which he has not got, to destroy what he has."‡

Still less are mere *omissions* to be considered as necessarily casting discredit upon testimony which stands in other respects unimpeached and unsuspected. Omissions are generally capable of explanation by the consideration that the mind may be so deeply impressed with, and the attention so rivetted to, a particular fact, as to withdraw attention from concomitant circumstances. It has been justly remarked, that a fact may have taken place in the very sight of a person who may not have observed it; and if he did observe it, may have forgotten it.§ Upon general principles therefore negative evidence is regarded as of little or no weight when opposed to the positive affirmative evidence of persons of unimpeachable credit. Sometimes however the non-relation of particular facts amounts to the *suppressio veri*, which in point of moral guilt may be equal to positive mendacity, and destructive of all claim to testimonial credit.‖

* Coxe's Mem. of Walpole, i. 73.

† See in Clarendon's Hist. (iv. 436.) a remarkable instance of historical dishonesty. He states that Pym died of a loathsome disease, *morbus pendiculosus*, evidently with the design of propagating the notion that it was "a mark of divine vengeance" (Hume's Hist. vii. 540.); whereas he must have known that Pym's corpse was exposed to public view for several days before it was interred, in confutation of this calumnious statement. (Ludlow's Mem. p. 31.)

‡ Ed. Rev. vol. xc. p. 310.

§ Sir Herbert Jenner, in Chambers *v.* the Queen's Proctor, 2 Curt. 415.

‖ Grafton, who was printer to Queen Elizabeth, in his chronicles published in 1562, in writing the history of King John, has made no mention of Magna Charta; perhaps he considered that his silence might be deemed complimentary to that arbitrary princess. Ed. Rev. liii. 5.

[*225]

*SECTION 3.

CASES IN ILLUSTRATION OF THE FORCE OF CIRCUMSTANTIAL EVIDENCE.

MANY remarkable cases of this nature have been given in the preceding pages, in application to the exemplification of some specific doctrine or object; to these will now be added, as an appropriate commentary upon this discussion of the scientific principles which govern the reception and estimate of circumstantial evidence, some of the most curious and instructive examples of the force of a cumulation of moral and mechanical facts which have ever occurred in the annals of criminal jurisprudence.

1.) In the autumn of 1786 a young woman, who lived with her parents in a remote district in the stewartry of Kirkcudbright, was one day left alone in the cottage, her parents having gone out to the harvest field. On their return home a little after mid-day they found their daughter murdered, with her throat cut in a most shocking manner. The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. Upon opening the body the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the footsteps of a person who had seemingly been running hastily from the cottage, by an indirect road through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person in his haste and confusion had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately meas-

[*226] ured, and an *exact impression taken of them; and it appeared that they were those of a person who must have worn shoes the *soles* of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also along the track of the footsteps, and at certain intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand that had been bloody. Not the slightest suspscion at this time attached to any particular person as

the murderer, nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral a number of persons of both sexes attended, and the stewart-depute thought it the fittest opportunity of endeavoring if possible to discover the murderer; conceiving rightly that to avoid suspicion whoever he was, he would not on that occasion be absent. With this view he called together after the interment the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off and measured; and one of the shoes was found to resemble, pretty nearly, the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish; which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination however of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at that place. The measurement of the rest went on, and after going through nearly the whole number, one at length was discovered which corresponded exactly with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails. William Richardson, the young man to whom the shoe belonged, on being asked where he was on the day the deceased was murdered, replied, seemingly *without embarrassment, [*227] that he had been all that day employed at his master's work, a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted; but some circumstances occurring a few days afterwards, having a tendency to excite it anew, the young man was apprehended and lodged in jail. Upon his examination he acknowledged that he was *left-handed;* and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before. He still adhered to what he had said of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided; but in the course of the inquiry it turned out, that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day; that he called at a smith's shop, under pretence of wanting something, which it did not appear he had any occasion for; and that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was commit-

ted (and which corresponded to the time that Richardson was absent from his fellow-servants) she saw a person exactly with his dress and appearance running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced. His fellow-servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's carts; and that when passing by a wood, which they named, he said that he must run to the smith's shop, and would be back in a short time. He then left the cart under their charge; and having waited for him about half an hour,
[*228] *which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been longer absent than he said he would be, to which he replied that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle; on which they asked where he had been. He said he had stepped into a marsh, the name of which he mentioned; on which his fellow-servants remarked that he must have been either mad or drunk if he had stepped into that marsh, as there was a footpath which went along the side of it." It then appeared, by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day. They were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood on them. The last he accounted for by saying, first, that his nose had been bleeding some days before; but it being observed that he had worn other stockings on that day, he said he had assisted in bleeding a horse; but it was proved that he had not assisted, and had stood at such a distance that the blood could not have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood. The shoemaker was then discovered who had mended his shoes a short time before, and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out that Richardson had been acquainted with the deceased, who was consi-

dered in the county as of weak intellect, and had on one occasion been *seen with her in a wood, in circumstances [*229] that led to a suspicion that he had had criminal intercourse with her; and on being taunted with having such connexion with one in her situation, he seemed much ashamed and greatly hurt. It was proved further, by the person who sat next to him when his shoes were measuring, that he trembled much, and seemed a good deal agitated; and that in the interval between that time and his being apprehended he had been advised to fly, but his answer was, "Where can I fly to?" On the other hand, evidence was brought to show that, about the time of the murder, a boat's crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said that some of the crew might have committed the murder, though their motives for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighbourhood. The prisoner was tried at Dumfries, in the spring of 1787, and the jury by a great plurality of voices found him guilty. Before his execution he confessed that he was the murderer; and said it was to hide his shame that he had committed the deed, knowing that the girl was with child by him. He mentioned also to the clergyman who attended him, where the knife would be found with which he had perpetrated the murder; and it was found accordingly in the place he described, under a stone in a wall, with marks of blood upon it*.

The casual discovery of circumstances which indicated the existence of a powerful *motive* to commit the deed,—the facts, that it had been committed by a *left-handed* man, as the prisoner was, thus narrowing the range of inquiry, *and that there [*230] was an interval of absence which afforded the prisoner the necessary *opportunity* of committing the crime,—his false assertion that he had not been absent from his work on that day, contradicted as it was by witnesses who saw him on the way to and in the vicinity of the scene of the murder, amounting to an admission of the relevancy and weight of that circumstance if uncontradicted,—the discovery of his footsteps, near the spot,—his agitation at the time of the admeasurement and comparison of his shoes with the impressions,—the discovery of his secreted stockings, spotted with blood, and soiled with mire peculiar to the vicinity of the cottage,—

* Rex *v.* Richardson, Burnett's C. L. *ut supra*, p. 524. This case is also concisely stated in the Memoirs of the Life of Sir Walter Scott, (vol. iv. p. 52. 2nd ed.); and it supplied one of the most striking incidents in Guy Mannering.

the scratches on his face,—his various contradicted statements,—all these particulars combine to render this a most satisfactory case of conviction, and to exemplify the high degree of assurance which circumstantial evidence is capable of producing.

2.) A man named Patch had been received by Mr. Isaac Blight, a ship-breaker, near Greenland Dock, into his service in the year 1803. Mr. Blight having become embarrassed in his circumstances in July 1805, entered into a deed of composition with his creditors; and in consequence of the failure of this arrangement he made a colourable transfer of his property to the prisoner. It was afterwards agreed between them, that Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1250. Of this amount, £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September; the prisoner representing that he had received the purchase-money of an estate and lent it to Goom. On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take up the bill, and withdrew it, substituting his own
[*231] draft upon Goom, to fall due on the *20th of September. On the 19th of September the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford, and then went to London, and represented to the bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore they were not to present it. The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom the prisoner, about eight o'clock on the same evening (the 19th), sent out to procure some oysters for his supper. During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the family, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated; and a man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball had entered the shutter, it was clear that it had been discharged by some person who was close to the shutter; and the river was so much below the level of the house, that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined

the offer of the neighbours to remain in the house with him that night. On the following day he wrote to inform the deceased of this transaction, stating his hope that the shot had been accidental, that he knew of no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him. Mr. Blight returned home on the 23rd of September, having previously been to London to see his bankers on the subject of the £1000 draft. Upon getting home the draft became the subject of conversation, and the deceased desired the prisoner to go to London and not to return *without the money. Upon his return [*232] the prisoner and the deceased spent the evening in the *back* parlour, a different one from that in which the family usually sat. About eight o'clock the prisoner went from the parlour into the kitchen and asked the servant for a candle, complaining that he was disordered. The prisoner's way from the kitchen was through an outer door which fastened by a spring lock, and across a paved court in front of the house, which was enclosed by palisadoes, and through a gate over a wharf, in front of that court, on which there was the kind of soil peculiar to premises for breaking up ships, and then through a counting-house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the former shot. The servant heard the privy-door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting, upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance, with his clothes in disorder. He evinced great apparent concern for Mr. Blight, who was mortally wounded and died on the following day. From the state of the tide, and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them. In consequence of this event Mrs. Blight returned home, and the prisoner, in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own. Suspicion soon fixed upon the prisoner, and in his sleeping-room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy. The prisoner usually wore boots, but on the evening of the murder he wore shoes and stockings. It was

supposed that, to prevent alarm to the deceased or the
[*233] *female servant, the murderer must have approached without his shoes, and afterwards have gone on the wharf to throw away the pistol into the river. All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false. He attempted to tamper with the servant-girl as to her evidence before the coroner, and urged her to keep to one account; and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased, and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to his ownership of the soiled stockings, which however were clearly proved to be his, and for the soiled state of which he made no attempt to account. The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had been on ill terms; but they had no motive for doing him any injury, and it was clearly proved that upon both occasions of attack they were at a distance.

The prisoner's motive was to possess himself of the business and property of his benefactor; and to all appearance his falsehoods and duplicity were on the point of being discovered. His apparent incaution on the evening of the murder could hardly be accounted for after the preceding alarm by any other supposition than that it was the result of premeditation, and intended to afford facilities for the execution of his dark purposes. The direction of the first ball through the shutter, excluded the possibility that it had been fired from any other place than the deceased's own premises; and by a singular concurrence of circumstances, it was clearly proved that no person escaped from the premises after either of the shots, so that suspicion was necessarily restricted to the persons on the premises.

The occurrence of the first attack during the temporary
[*234] absence of the servant (that absence contrived by the *prisoner himself),—the discovery of a ramrod in the very place where the prisoner had been, and of his soiled stockings folded up so as to evade observation,—his interference with one of the witnesses,—his falsehoods respecting his pecuniary transactions with Goom and with the deceased,—and his attempts to exonerate himself from suspicion by implicating other persons,—all these cogent circumstances of presumption tended to show not only that the prisoner was the only person who had any motive to destroy the deceased, but that the crime could have been committed by no other

person; and while all the facts were naturally explicable upon the hypothesis of his guilt, they were incapable of any other reasonable solution. The prisoner was convicted and executed*.

3.) Mr. Benjamin Robins, a respectable farmer, who had been at Stourbridge market on the 18th of December, left that place on foot a little after four in the afternoon, to return home, a distance of between two and three miles. About half a mile from his own house he was overtaken by a man, who inquired the road for Kidderminster; and they walked together for two or three hundred yards, when the stranger drew behind and shot him in the back, and then robbed him of about eleven pounds in money and a silver watch. After lingering ten days, he died of the wound thus received. Mr. Robins noticed that the pistol was long and very bright, and that the robber had on a dark-coloured great-coat, which reached down to the calves of his legs. Several circumstances of correspondence with the description given by the deceased, conspired to fix suspicion upon the prisoner, who for about fourteen months had worked as a carpenter at Ombersley, seventeen miles from Stourbridge. It was discovered that he *had been absent [*235] from that place from the 17th to the 22nd of December; that on the 23rd of that month he had taken two boxes, one containing his working-tools and the other his clothes, to Worcester, and there delivered them to a carrier, addressed to John Wood at an inn in London, to be left till called for, the name by which he was known being William Howe; and that on the 25th he finally left Ombersley, and went to London. Upon inquiry at the inn to which the boxes were directed, it was found, that a person answering the description of the prisoner had removed them in a mealman's cart to the Bull in Bishopgate Street, and that on the 5th of January they had been removed from thence in a cooper's cart. Here all trace of the boxes seemed cut off; but on the 12th of January the police officers succeeded in tracing them to a widow woman's house, in a court in the same street; when, upon examining the box which contained the prisoner's clothes, they found a screw-barrel pistol, a pistol key, a bullet mould, a single bullet, a small quantity of gunpowder in a cartridge, and a fawn-skin waistcoat; which latter circumstance was important, as the prisoner was seen in Stourbridge on the day of the murder, dressed in a waistcoat of that kind. By re-

* Surrey Spring Ass. 1806, *coram* L. C. B. Macdonald. Gurney's Short-hand Report.

maining concealed in the woman's house the police were enabled to apprehend the prisoner, who called there on the following evening. Upon his apprehension, he denied that he had ever been at Stourbridge, or heard of the deceased being shot; and he accounted for changing his name at Worcester, by stating that he had had a difference with his fellow work-people, and afterwards that he did it to prevent his wife, whom he had determined to leave, from being able to follow him. On being asked where he was on the 18th of December, he said he believed at Kidderminster, a town about six miles from Stourbridge. Upon the prisoner's subsequent examination before the magistrates, he stated that he was at

[*236] *Kidderminster on the 17th of December, and at Stourbridge on the 18th, (the day of the murder,) but that he was not out of the latter town from the time of his arrival there, at one o'clock in the afternoon, until half-past seven o'clock on the following morning; that in the afternoon of that day he went to look about the town for lodgings, and ultimately went to his lodgings about six o'clock in the evening. The account which the prisoner thus gave of himself was proved to be a tissue of falsehoods. He had been seen by several witnesses between four and five in the afternoon of the day in question, on the road leading from Stourbridge toward, and not far from, the spot where the murder was committed. About half-past five, the prisoner was seen going in great haste in the direction from the spot where the deceased had been shot, toward Stourbridge. He afterwards called at two public-houses at Stourbridge,—at the first of them about six o'clock, and at the other about nine o'clock the same evening; at both of which places the robbery and attack were the subjects of conversation, in which the prisoner joined; and he was distinctly spoken to as having worn a fawn-skin waistcoat. On the 21st of December the prisoner sold a watch of which the deceased had been robbed, at Warwick, stating it to be a family watch. But the most conclusive circumstance was, that a letter was sent by the prisoner while in gaol to his wife, who, being herself unable to read, had got a person to read it to her; and it was found to contain a direction to remove some things concealed in a rick near Stourbridge; where, upon search being made, were found a glove, containing three bullets, and a screw-barrel pistol, the fellow to that found in the prisoner's box; and a gun-maker deposed that the bullet extracted from the wound had been discharged from a screw-barrel pistol, such as that produced, and that that bullet and the bullet found in the prisoner's box were cast in the same mould.

*The possibility of the prisoner's guilt was unquestionable, inasmuch as he had been seen near the spot at or about the moment when the murder was committed; his [*237] denial, on his apprehension, contrary to the truth, that he had ever been at Stourbridge, or heard of the act, denoted a consciousness of the fatal effect of any evidence tending to establish the fact of his presence there. The discovery of a fawn skin waistcoat in the prisoner's possession, corresponding with that worn by him at Stourbridge on the evening of the murder,—his possession and disposal of the deceased's watch within three days after he had delivered it to his murderer,—his false statement that it was a family watch,—the discovery of the articles in the rick, in consequence of his own act,—the correspondence between the weapon found in the rick and that found in the prisoner's box, and between the bullet extracted from the wound and that found in the same box, and the peculiarity that the deceased had been killed by a wound from a screw-barrelled pistol,—all these circumstances placed the guilt of the prisoner beyond any reasonable doubt, and there was no possibility of referring them to casual and accidental coincidence, or of explaining them upon any hypothesis compatible with his innocence. The prisoner was convicted, and before his execution fully confessed his guilt.*

4.) Three men, named Smith, Varnham and Timms, were tried before Mr. Justice Coltman, at the Norfolk spring assizes, 1837, for the murder of Hannah Mansfield, on Tuesday the 3d of January preceding. The deceased, who was about forty years of age, lived alone in a cottage at Denver, on the border of a common, at a distance from the turnpike road leading from Hilgay through Denver to Downham, and remote from any other house, except an adjoining cottage under the same roof, occupied by a *la- [*238] borer and his family. The deceased had acquired some repute as a fortune-teller, for which purpose she kept by her some money, which she called her bright money; and she possessed a quantity of plate, consisting of cream-jugs, table and tea-spoons, sugar-tongs, salt-cellars, and a silver tankard, which she kept in a corner cupboard and had frequently boastfully displayed. The deceased spent the evening preceding the murder at her neighbour's house, which she left about half-past eleven; her neighbour's wife, being engaged in washing, did not go to bed till one o'clock; when she disturbed her husband, who as he lay awake about two o'clock heard a noise in the deceased's cottage, but hearing nothing further

* Stafford Sp. As. 1813, *coram* Mr. Justice Bayley.

he went to sleep again. About ten o'clock on the following morning the poor woman was found dead in her cottage, with her throat cut from ear to ear; the cottage door had been split open by some violent effort, and the cottage had been robbed of the deceased's money and treasure. The footsteps of two men were traced from the turnpike-road towards the deceased's house, and from the house into the stack-yard, and back again to the footpath, and across the common to a run of water, and thence to the turnpike road; one of the footsteps was very large, and peculiarly shaped and nailed, there being four nails in the center of the heel, in a line from back to front, and two on each side; and there were nails also in the waist of the heel, between the sole and the heel, and the sole was very full of nails. The prisoner Timms shoes exactly corresponded with these marks; the other footstep was a smaller one, and full of nails. The large footmark proceeding from the house had marks of blood, and the smaller footstep was on the other side of the path, and the center of the path was so hard and beaten that a third person might have walked on it without leaving any impression. Only the larger footstep was traced to the stack-yard, but both [*239] footsteps were *traced in a direction toward and from the house. There was also the footstep of a third person, who appeared to have been stationed for the purpose of watching the back door of the adjoining cottage. The three prisoners had worked in the neighbuorhood as excavators, a few months before the murder; and about twelve months previously, the prisoner Smith, in company with two other men, had called at the other cottage, and asked if Hannah Mansfield was at home, supposing that to be her cottage, stating that he had lost some tools, about which he wished to consult her. The prisoners had been loitering at various low public houses in the neighborhood of the deceased's cottage for several days preceding the murder, and they left one of those public houses about two miles from her residence, where they had spent the evening, about eleven o'clock on the night of the murder. Three men, corresponding in appearance with the prisoners, one of whom was identified as the prisoner Timms, were met on the following morning about three o'clock, a mile from the deceased's house, walking very fast along the road from Denver to Downham; and about half past eight o'clock the same morning the same three men were seen at Leverington, fourteen miles from Denver, apparently fatigued, and the pocket of one of them was stuffed with something bulky. At Sutton St. Edmund's, about twenty miles from Denver, the prisoners stopped

at a public house to refresh themselves, and one of them paid away a very bright and unworn sixpence and shilling, of the year 1817. After having staid some hours the prisoners proceeded to Whaplode Drove, where they remained at a public house for several days, and fell into company with a shoemaker, who made two pair of boots for the other prisoners Varnham and Smith, for which Timms paid in a half-sovereign, a half guinea and a sixpence. Varnham cut the tops from his old boots, and the landlord's wife burned the soles, *and threw the clates upon an ash heap, [*240] where they were afterwards found by a police officer, and they exactly fitted one of the impressions made in the snow near the cottage. While sitting by the fireside one evening at this public-house, the prisoner Smith laid hold of the bottom of his pocket, which seemed heavy, and a bundle contained in a silk handkerchief dropped out, from which some teaspoons, a pair of sugar-tongs and some glass fell on the floor; the glass was broken, the other things he hastily collected and replaced. On the following day the prisoner Timms called upon the shoemaker, who had been present on the previous evening ostensibly to talk about the boots which he had to make, and took occasion to remark, that "he need not say anything about what he had seen, as it might get the landlord into a scrape, though for themselves they did not care about it, as they had got the things from Lisbon." On the Saturday following the prisoners were traced to Wittlesea, where they offered for sale to a gunmaker a mass of molten silver, upwards of two pounds weight, which the prisoner Timms said had consisted of spoons, salt-cellars, and elegant things fit for any table,—a description corresponding with the deceased's plate; and they offered to purchase a pair of pistols. The silver was cut by the person to whom it was offered into six or seven pieces, and offered by him for sale to another person; but not having succeeded in disposing of it, they gave his wife in return for his trouble a small strip of it, weighing about an ounce, and three keys, which were afterwards identified as having belonged to the deceased. The prisoners were then traced to and apprehended at Doncaster. To the officers they gave false accounts of themselves. Stains of blood were found upon some parts of the clothes of all the prisoners, and the clothes of two of them appeared to have been washed in order to remove stains. On the person of Smith were found several pounds in money, a picklock key *lucifer matches, and a knife on [*241] which was some coagulated blood; and on the person of

Timms was found, wrapped up in a piece of linen, a mass or wedge of molten silver. With several of their fellow-prisoners Smith and Varnham conversed upon the subject of this cruel action in language of disgusting coarseness and brutality; which implied guilty knowledge of and participation in the crime, since they expressed confidence of security if their companions remained silent, as nobody had seen them go to the house.

The knowledge which the prisoners possessed of the locality of the deceased's cottage, and of her character and circumstances,—their presence in the vicinity at so unseasonable and suspicious an hour, in the inclement season of mid-winter, and so close upon the time when the deceased was murdered,—their subsequent wanderings, apparently without any object,—their profuse expenditure of money, and wanton destruction of valuable articles of apparel,—their possession of so much money and molten silver when apprehended,—the correspondence of the shoe marks about the cottage with the shoes of two of the prisoners,—and, above all, the possession of the deceased's keys,—the concurrence of these strong and otherwise inexplicable facts could not be rationally accounted for except by the conclusion of the guilt of the prisoners, who made a full confession. Smith and Timms were executed; but the sentence as to Varnham was mitigated.*

A foreigner, named Courvoisier, was tried at the Central Criminal Court (June 1840) for the murder of Lord William Russell, an elderly gentleman, seventy five years of age, a widower, who lived in Norfolk Street, Park Lane. The deceased's family consisted of the prisoner, who had been in his service as valet about five weeks, and of a housemaid and cook, who had lived with him
[*242] three years; *beside a coachman and groom who did not live in the house. On the 6th of May the female servants went to bed as usual, and the housemaid on going to bed lighted a fire and set a rush-light in her master's bedroom, which presented its usual appearance; the prisoner remained sitting up to warm his bed. The housemaid rose about half-past six on the following morning, and on going down stairs knocked, as usual, at the prisoner's door. At her master's door she noticed the warming-pan, which was usually taken downstairs; on going into a back drawing-room she found the drawers of her master's desk open, his bunch of keys lying on the carpet, and a screw-driver lay on a chair. In the hall his Lordship's cloak was found neatly folded up, together with

* Rex *v.* Smith, Varnham and Timms.

a bundle, containing a variety of valuable articles, most of them portable, such as a thief would ordinarily put in his pocket instead of deliberately packing up. In the dining-room she found several articles of plate scattered about. The street-door, though shut, was unfastened, but the testimony of the police who passed the house many times in the night rendered it very unlikely that any person had left it in that direction. Alarmed by these appearances the housemaid called the prisoner, and found him dressed, though only a few minutes had elapsed since she had knocked at his door, which was a much shorter time than he usually took to dress. They went together downstairs; and after examining the state of the dining room and the prisoner's pantry, where the cupboard and drawers were all found opened, they proceeded to their master's bed-room where he was found with his throat cut, in a manner which must have produced instant death. His Lordship usually placed his watch and rings on his dressing-table; but they had been taken away, and his note-cases, in one of which the prisoner stated that he had seen a £10 and £5 note a few days before, were open and emptied of their contents. A book was found on [*243] the floor, and his Lordship's spectacles lay upon it, and there was a candlestick about four or five feet from the bed, with the candle burned to the socket. These articles appeared to have been so placed, to create the impression that his Lordship had been murdered while reading; but he was not accustomed to read in bed, and only so much of the rush-light was burned as would have been consumed in about an hour and a half, though the candle was completely burned away. The prisoner stated that he left his master reading. Upon the door of the prisoner's pantry, leading to a back area, were marks as if it had been broken into, and the prisoner suggested that the thieves had entered by that door; but they appeared to have been made from within, and none of them had been made by the application of sufficient force to break open the door; the bolts appeared not to have been shot at the time, and the socket of one of them had been wrenched off when the door was open. The marks on this door appeared to have been made with a bent poker found in the pantry. It was clear that no person had entered the premises from the rear, since in one direction they could have been approached only by passing over a wall covered with dust, which would have retained the slightest impression; and on the other, the party must have passed over some tiling which was so old and perished as necessarily to have been damaged by the passing of

any person over it; while from the testimony of the police it was equally clear that no person had escaped through the front door. For several days the missing articles could not be found, and the case appeared to be wrapt in impenetrable mystery; but at length, upon a stricter search, his Lordship's rings and Waterloo medal, five sovereigns and a £10 note, the latter of which had been removed from his note case, were found concealed behind the skirting-board in the prisoner's pantry; and beneath the leaden cover-
[*244] ing of a sink was found his Lordship's watch, *and several other articles were also found in other parts of the same room. But a quantity of plate which had been stolen still remained undiscovered, notwithstanding the most diligent efforts to discover it: and its non-production was the only circumstance which gave any apparent countenance to the possibility that the house had been robbed on the night of the murder, by parties who had escaped. The mystery was cleared up however in a very extraordinary manner, during the progress of the trial. About a fortnight before the murder, the prisoner had left a parcel in the care of an hotel-keeper with whom he had formerly lived as waiter, whose curiosity was excited to examine its contents by reading in a newspaper a suggestion that, as the prisoner was a foreigner, he had probably left the plate at one of the foreign hotels in London. The parcel was found to contain the missing plate. The prisoner had been known in this situation only by his Christian name, which circumstance accounted for the fact that suspicion had not been sooner excited by the account of the murder and robbery which had appeared in the daily journals. This discovery, in conjunction with the simulated appearances of external violence and robbery, and the conclusive evidence that the premises had not been entered from without, made it certain that the robbery of the plate and the murder had been committed by one of the inmates; while the manner and place of concealment, and the artless and satisfactory account given by the female servants, rendered it equally clear that the prisoner and he alone could have been the perpetrator of this cruel action. The prisoner made a confession of his guilt, and was executed pursuant to his sentence.*

It is scarcely possible, in the absence of unimpeachable direct evidence, to conceive of any grounds of moral assurance
[*245] and judgment more satisfactory and conclusive *than those afforded by such combinations of facts as were presented in the foregoing cases.

* Sessions Papers, 1840.

SECTION 4.

CONCLUSION.

The rules of evidence are the practical maxims of legal and philosophic sagacity and experience, matured and methodized by a succession of wise men, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion. They have their origin in man's nature, as an intellectual and a moral being; and "are founded" (to use the language of one of the most eloquent of advocates,) "in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life*." Such rules must of necessity be substantially the same, in all cases and in every civilized country; and the inviolable observance of them is indispensable to social security and happiness. To disregard them, under whatever circumstances or pretext, is to subject to the sport of chance those fundamental rights which it is the object of social institutions to secure.

The design of this Essay has been to investigate the foundations of our faith in circumstantial evidence, to ascertain its limits and its just moral effect, and to illustrate and confirm the reasonableness of the practical rules which have been established in order to prevent the unauthorized assumption of facts, and to secure to relevant facts their proper weight. It has been maintained that circumstantial evidence is inherently of a different and inferior nature from direct and positive testimony; but that nevertheless such evidence, although not invariably so, is most *frequently superior in proving power to the average strength of direct evidence; and that, under the safeguards and qualifications which have been stated, it affords a secure ground for the most important judgments in cases where direct evidence is not to be obtained. [*246]

It must however be conceded, that "with the wisest laws, and with the most perfect administration of them, the innocent may sometimes be doomed to suffer the fate of the guilty; for it were vain to hope that from any human institution all error can be excluded†." But certainty has not always been attained even in those sciences which admit of demonstration; still less can unfailing assu-

* 29 St. Tr. 966.

† Romilly's Obs. on the C. L. of Engl. p. 74.

rance be invariably expected in investigations of moral and contingent truth. Nor can any argument against the validity and sufficiency of circumstantial evidence as a means of arriving at moral certainty be drawn from the consideration that it has occasionally led to erroneous convictions, which does not equally apply as an objection against the validity and sufficiency of moral evidence of every kind; and it is believed that a far greater number of mistaken sentences have taken place in consequence of false and mistaken direct and positive testimony, than from erroneous inferences drawn from circumstantial evidence.

These considerations ought not therefore to produce an unreasonable and indiscriminate scepticism; the legitimate consequence of such reflections should be to inspire a salutary caution in the reception and estimate of circumstantial evidence, and to render the legislator especially wary how he aurhorizes, and the magistrate how he inflicts, punishment of a nature which admits neither of reversal nor mitigation. Would that the total abolition of such punishment were compatible with the paramount claims of social security; It is indispensable however, under every system, to the very ex-
[*247] istence of society, that the tribunals should *act upon circumstantial evidence. Infallibility belongs not to man; and even his strongest degree of moral assurance must be accompanied by the possible danger of mistake; but, after just effect has been given to sound practical rules of evidence, there will remain no other source of uncertainty or fallacy, than that general liability to error, which is necessarily incidental to all investigations founded upon moral evidence, and from which no conclusion of the human judgment in relation to questions of contingent truth, whether based upon direct or circumstantial evidence, can be absolutely and entirely exempt.

INDEX.

[The figures refer to the original pages, indented in the margin.]

A.

Actions, the subject of human laws, 40.
Affirmative to be proved, 145.
Alibi, unfavourable presumption from unsuccessful attempts to establish, 83.
—— artifices to give effect to false defence of, 83.
—— observations on defence of, 132.
—— circumstances which increase the credibility of defence of, 133.
—— remarkable case of, 141.
Analogy, 11.
Anno-domini water-mark, 29, 114.
Assurance, nature of different kinds of, 4.

B.

Belief, nature and degrees of, 5.

C.

Certainty, mathematical, 3, 6.
—— moral, 5, 6, 210.
Certitude, absolute, 5.
Chances, doctrine of, 6, 8, 14.
Character, evidence of, 131.
Circumstances, concurrence of, effect of, 213.
Circumstantial evidence, defined, 15.
—— essential characteristics of, 15.
—— inferior to direct evidence, 26.
—— inculpatory, moral, 37.
—— mechanical and extrinsic, 90.
—— exculpatory, 120.
Concealment, presumption from, 70.
Concurrence of independent witnesses or facts, effect of, 213.
Confederacy, difficulty of, where witnesses numerous, 217.
Confessional evidence, direct, 60.
—— must be voluntary, 60.
—— not obtained by torture, 61.

Confessional evidence, must be taken together, 65.
—— indirect, 60.
Confessions, false, 62, 66.
Consistency of witnesses necessary, 217.
Consistency of conduct presumptive of innocence, 70.
Convictions, erroneous, instances of, 54, 63, 66, 82, 91, 92, 105, 106, 125, 130, 139, 162, 163.
Corpus delicti, confession not sufficient proof of, 61.
—— general doctrine as to proof of, 156.
—— may be proved by circumstantial evidence, 158.
—— application of the doctrine as to proof of, to cases of homicide in general, 162.
—— in cases of poisoning, 178.
—— in cases of infanticide, 203.
Counsel, right of defence by, 152.
Credibility or internal probability, 10.
Crime, preparations for commission of, 46.
—— possession of means and instruments of, 46, 189.

D.

Dates and time, verification of, 114.
Death, proof of, as part of the *corpus delicti*, 152.
Declarations of intention, effect of, 45.
Demonstration, defined, 3, 5.
Dependent witnesses or circumstances, effect of, 214.
Depositions, prisoners' right to copies of, and to inspect, 219.
Discrepancies in testimony, effect of, 222.

E.

Evidence, defined, 1.
—— various kinds of, 2.
—— intuitive, 3.
Evidence of demonstration, 3, 5.
—— moral, 3, 5.
—— of testimony, 13.
—— direct, 16.
—— direct, superior to circumstantial, 26, 161.
—— —— circumstantial, characteristic of, 15.
—— —— proper subjects of, 16.
—— —— sources of, 34.
—— —— classification of, 25, 35.
—— —— inculpatory moral, 37.
—— —— mechanical, 90.
—— —— exculpatory, 120.

Evidence of demonstration, direct, general grounds of force of, 209.
—— —— special grounds of force of, 213.
—— presumptive, 16.
—— confessional direct, 60.
—— —— indirect, 67.
—— suppression, destruction, fabrication and simulation of, 72.
—— rules of induction applicable to, 135.
Experience, meaning of, 10.
—— province of, 11.

F.

Fabricated circumstances of presumption, 130.
Facility of disproof often imaginary, 219.
Fear, presumption from marks of, 70.
—— —— inconclusiveness of, 71.
Footmarks, evidence from, 99 *et seq.*
Flight, presumption from, 70.
—— —— inconclusiveness of, 71.
Force of circumstantial evidence, cases in illustration of, 225 *et seq.*

H.

Handwriting, proof of, 104.
—— comparison of, 109.
Harmony amongst witnesses, 220.
Homicide, general rules as to proof of *corpus delicti* in cases of, 162.
Human remains, destruction of, 77.
—— identification of, 164.

I.

Identification of property, 104.
—— of person, 90.
—— —— grounded on family likeness, 94.
—— —— from a portrait, 94.
—— —— from preservation of remains, 95.
—— —— from articles of dress, &c., 95.
—— —— from correspondence of fragments of articles, 95–99.
—— —— from impressions of shoes, 99–104.
—— —— from articles of property, 104.
—— —— quantity of light necessary for, 93.
—— of human remains by circumstantial evidence, 164.
Identity, cases of mistaken, of person, 31, 67, 82, 91, 92.
—— —— of things, 105 *et seq.*
Inculpatory circumstantial evidence, 37.
Indications, moral, 37.

Indications, inculpatory, 37.
—— —— mechanical, 90.
Indigence, sudden transition from, suspicious, 54.
Induction, defined, 135.
—— rules of, 136 *et seq.*
Infanticide, presumption of, from concealment of birth, 21, 125.
—— proof of *corpus delicti* in cases of, 203.
Intention, declarations of, 45.
Intuition, 3.

J.

Judgment, defined, 1.
Judgments, intuitive, 3.
—— deductive or inferential, 16.

L.

Light, quantity necessary to identification, 93.
Likeness, family, a ground for inferring identity, 94.

M.

Mathematical certainty, 3, 6.
Moral evidence, 3, 5.
—— certainty, 5, 6, 10.
—— probability, 6.
—— indications, 37.
Motives to crime, presumptions founded upon, 37.
—— not the proper subject of testimony, 43.
—— absence of, presumptive of innocence, 41.

O.

Omissions in testimony, effect of, 224.
Onus probandi, 143.

P.

Poisoning, proof of, 178.
—— —— from symptoms, 178.
—— —— from *post-mortem* appearances, 178.
—— —— from chemical tests, 179.
—— —— from moral circumstances, 75, 187.
—— —— analysis of remarkable cases of, 115, 174, 176, 178, 183, 189, 192, 196, 198.
Portrait, identification from a, 94.
Possession, criminal, of poison, 189.
—— recent, of fruits of crime, 47 *et seq.*
Prejudice often epidemic, 71.

Preparations for commission of crime, 46.
Presumptions, what, 17.
—— natural, 18.
—— legal, 18–25.
—— classification of, 25.
—— statutable, of infanticide, 25.
—— writings of the civilians on, 19, 22 *et seq.*
Presumptions founded on motives, 37.
—— from declarations of intention, 45.
—— from preparations for crime, 46.
—— from recent possession of the fruits of crime, 47–57.
—— from sudden transition from indigence, 54.
—— from unexplained appearances of suspicion, 57.
—— from false explanations of suspicious appearances, 59.
—— from indirect confessional evidence, 60.
—— from concealment, disguise, flight, and other indications of fear, 70.
—— from suppression or destruction of evidence, 72.
—— from attempts to prevent *post-mortem* examination, 75.
—— from destruction of human remains, 77.
—— from attempts to pervert the course of justice, 78.
—— from simulation of facts, 79.
—— from false representations, 79.
—— from obliteration of marks of identity, 75.
—— from unsuccessful attempts so establish an *alibi*, 83.
—— from secret burying or disposing of body, 206.
—— of murder from concealment of birth abolished, 22, 125, 206.
—— from false representations to prepare connections for event of death, 79.
—— statutory, 84.
—— exculpatory, 120.
—— —— *prima facie*, of innocence, 120.
—— —— from discrepancies in inculpatory evidence, 121.
—— —— from inconsistency of demeanour and conduct in inculpatory witnesses, 123.
—— —— from absence of criminal motives, 124.
—— —— from counteracting motives, 125.
—— —— from absence of marks of fear and mental emotion, 127.
—— —— from circumstances of counter presumption, 127.
—— —— from character, 131.
—— —— from *alibi*, 132.
Presumptive evidence, what, 16.
Probability, defined, 5, 6.
—— mathematical, 5.
—— moral, 6.

Probability, internal, or credibility, 10.
Proof, defined, 1.

R.

Rules of induction applicable to circumstantial evidence, 135 *et seq.*

S.

Simulation of facts, 79.
Statutory presumptions, 84.
Suspicion unfavourable to correct judgment, 39.
—— unexplained appearances of, 57.
—— attempts to remove, by false statements, 59.

T.

Testimony, 3.
—— strength of, 7.
—— concurrent and independent, force of, 214.
—— dependent, force of, 214.
—— must be consistent, 217.
Time, verification of, 114.
Torture, 24, 62.
—— confessions obtained by, 62.
Truth, definition of, 1.
—— necessary, 2.
—— contingent, 2.
—— —— subjects of, 3.

V.

Variations in testimony, effect of, 222.
Verification of time and dates, 114.

W.

Water-mark in paper, 29, 114.
Witchcraft, confessions of, in the State Trials, 64.

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